(33,961)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 652

ALICE BARBEE WICK, APPELLANT,

vs.

CHELAN ELECTRIC COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

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[fol. 1] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

No. 7391

CHELAN ELECTRIC COMPANY, a Corporation, Petitioner,

vs.

ALICE BARBEE WICK and CHELAN COUNTY, WASHINGTON, a Municipal Corporation, Respondents

NOTICE OF PETITION—Filed Sept. 17, 1926

The State of Washington to Alice Barbee Wick and Chelan County, Washington, a municipal corporation:

You, and each of you are hereby notified that the petitioner Chelan Electric Company, a corporation, has filed in the above entitled court, with the Clerk thereof, a petition showing that it is a public service corporation authorized to appropriate lands, real estate premises and property for the purpose of constructing a reservoir, dam and power plant to develop and utilize for railroad, lighting and other public purposes, the water power afforded by Lake Chelan and the Chelan River; that the petitioner has permits from the Supervisor of Hydraulics of the State of Washington to appropriate and store for beneficial uses substantially all the waters of Lake Chelan and the Chelan River; and a license from the Federal Power Commissioner under and by virtue of the Act of Congress approved June 10th, 1920 known as "The Federal Water Power Act" for the construction, operation and maintenance of the dam reservoirs, and other project works necessary or convenient for the development, transmission and utilization of the water power afforded by said Lake Chelan and the Chelan River and by raising and storing the waters thereof to the maximum elevation of 1,110 feet above mean sea level; that in order to develop and apply to the beneficial public uses above mentioned the waters of Lake Chelan and the Chelan River it is necessary for the pe-
[fol. 2] titioner to appropriate and acquire the perpetual

right to impound the waters of Lake Chelan and the Chelan River and to raise the same to the maximum elevation of 1,110 feet *feet* above mean sea level and to inundate and overflow to the maximum elevation of 1,110 feet above mean sea level the following described real estate situate in the County of Chelan, State of Washington, to-wit:

Government lots one (1) two (2), three (3) and four (4) and the southwest quarter of the southwest quarter of section three (3) Lots five (5) and six (6), section four (4); Lot one (1), section ten (10); Lot forty-two (42) section eleven (11); and lot fort*h*-three (43) all in township twenty-seven (27) north, range twenty-one (21) E. W. M. together with all shorelands of the second class, situate in front of, adjacent to, or abutting upon that portion of the Government Meander Line lying in front of the above described property, and all littoral and riparian rights thereinto belonging or appertaining, subject to the right of the Chelan Electric Company to perpetually back and hold water upon and over the shore lands situate in front of, adjacent to, or abutting upon that portion of the Government Meander Line lying in front of Lot one (1), Section Ten (10) and Lot four (4), section three (3) township twenty-seven (27) North range twenty one (21) E. W. M. and to overflow and inundate the same to the high water mark of Lake Chelan, as granted by the order of the State Board of Land Commissioners date- December 6th, 1909 (Application No. 7077) under and by virtue of Chapter 125, Session Laws of 1907.

That the object of said proceeding is to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by the petitioners to the owner or owners, respectively, and to all tenants, encumbrancers and other- interested for the taking or injuriously affecting the lands, real estate and premises above described in the manner set forth in said petition, and for a release from all liability for all damages to said lands, real estate and premises, in any manner arising from the impounding and storing of the waters of said Lake Chelan and the Chelan River and raising the same to the maximum elevation of 1,110 feet above mean sea level, and to obtain a decree to the contemplated use for which said lands real estate, premises and property are sought

to be appropriated is a public object and use and that the public interest requires the prosecution of the aforesaid enterprise of the petitioner, and that said lands, real estate, premises and property sought to be appropriated and injuriously affected are required and necessary for the pur-
[fol. 3] poses to such enterprise.

Notice is further given that on the 11th day of October, 1926 at the hour of 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the petitioner will present said petition and proof in support thereof to said Superior Court for hearing and determination and for the fixing of a time at which a jury shall be called to determine the amount of compensation to be made and the parties to whom the same shall be paid.

Dated this 17" day of September, 1926.

Chelan Electric Company, by Post & Russell, 533 Exchange National Bank Building, Spokane, Washington. Thomas Balmer, Charles S. Albert, Edwin C. Mathias, 302 King Street Passenger Station, Seattle, Washington, Attorneys for Petitioner.

[fol. 4] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

PETITION—Filed Sept. 17, 1926

To the Honorable Superior Court of the State of Washington in and for the County of Chelan and to the judge thereof:

The petitioner, Chelan Electric Company, respectfully shows:

I

That the petitioner, Chelan Electric Company, is a public service corporation organized and existing under the laws of the State of Washington, that it has complied with the laws of said State of Washington relating to such corporations, and has paid its annual license fee last due the State

of Washington and its license fees for all previous years, and that all of its corporate stock has been subscribed for and fully paid.

II

That the objects and purposes for which the petitioner was and is incorporated are, among others, to develop, adopt and utilize for railroad, lighting, and for other public purposes the water power afforded by Lake Chelan and the Chelan River; to construct, operate and maintain a plant or plants for the development and transmission of electric energy into the town of Chelan and into other cities, towns and places for public use; to erect, own and operate a plant or plants for furnishing such electric energy in such cities, towns and places for lighting the same and furnishing such energy to individuals and to public and private corporations and municipal bodies for public purposes; to erect and maintain dams and reservoirs, and to operate the same.

[fol. 5] III

That by its amended articles of incorporation the petitioner for the purpose of availing itself of the benefits of Chapter 159, Session Laws of 1907, entitled "An Act relating to the exercise of the power of eminent domain by corporations generating and transmitting electricity and using and selling the same for light and power," approved March 13th, 1907, (Remington's Compiled Statutes, Sections 5432-5434), has assumed the additional right to sell electric power and electric light to private consumers outside the limits of a municipality and to sell electric power to private consumers within the limits of a municipality from the electricity generated and transmitted by it for public purposes and not needed by it therefor, and has provided in its said amended articles of incorporation that in respect of the purposes mentioned in said act it assumes and undertakes to and with the State of Washington and the inhabitants thereof the duties and obligations of a public service corporation.

IV

That the petitioner has a permit from the Supervisor of Hydraulics of the State of Washington to appropriate all

waters of Chelan River and Lake Chelan, subject to existing rights and to a reservation of not to exceed 33,000 acre-feet each year for irrigation and domestic uses on lands bordering and near the Lake, said 33,000 acre-feet, or such part of it which may be required for beneficial use on said lands to be so used only under permits issued by the State Supervisor of Hydraulics, and unless and until all of said 33,000 acre-feet is covered by valid appropriation, any unappropriated balance thereof is also available for use of the petitioner under the above mentioned permit from the State Supervisor of Hydraulics. That the petitioner also has a permit from the Supervisor of Hydraulics of the State of Washington to construct a reservoir and to store for beneficial use in Lake Chelan and the Chelan River the waters so covered by its appropriation permit first mentioned. That under and by virtue of said permits the petitioner is entitled to use the said waters of Lake Chelan [fol. 6] and the Chelan River in the development of electric power and energy for municipal lighting, railway operation, irrigation pumping and other uses permitted by law. That petitioner is a public service corporation as the same is defined in Chapter 117 of the Laws of 1911 of the State of Washington and acts amendatory thereto; that it has heretofore filed with the Public Service Commission, or its successor, the Department of Public Works, its schedule of rates for electric energy furnished to the public; that it has heretofore and does now recognize the right, power and authority of the Department of Public Works to regulate all its rates and service for and in the furnishing of electric energy to all its customers and the public generally, as provided in that statute.

V

That Lake Chelan is one of the navigable waters of the United States, and that the petitioner has a license from the Federal Power Commission under and by virtue of the Act of Congress approved June 10th, 1920, (41 Stat. 1063), known as "The Federal Water Power Act," for the construction, operation and maintenance of the dams, water conduits, reservoirs, power houses, transmission lines and other project works necessary or convenient for the devel-

opment, transmission and utilization of the water power afforded by the waters of said Lake Chelan and the Chelan River and by raising and storing such waters to the maximum elevation of 1,100 feet above mean sea level. That in and by said Federal Power Commission license it is provided, inter alia, as follows, to-wit:

"The licensee shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged; and in case of the development, transmission, distribution, sale or use of power in public service by the Licensee or by its customers engaged in public service within a state which has not authorized and empowered [fol. 7] a commission of other agency or agencies within said state to regulate and control the service to be rendered by the Licensee or by its customers engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of this license that jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control. The Commission hereby declares it to be its purpose to exercise the jurisdiction over any securities hereafter issued or assumed by the Licensee to the extent authorized under the provisions of sections 19 and/or 20 of the Act; and the Licensee shall not hereafter sell, pledge, repledge, or otherwise dispose of any of its own securities or assume any obligation or liability as guarantor, endorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, unless and until authorized by the Commission so to do; Provided, that the jurisdiction of the Commission shall cease and detemine as to each specific matter of regulation and control prescribed in this article as soon as the State shall have provided a commission or other authority for the regulating and control of that specific matter."

That the petitioner has accepted all of the terms and conditions of the said Federal Water Power Act of June 10th 1920, and the further conditions imposed in the said Federal Power Commission license.

VI

That in order to develop and apply to the beneficial public use above mentioned the waters of Lake Chelan and the Chelan River, as authorized by the above mentioned appropriation and reservoir permits from the State of Washington and the above mentioned license from the Federal Power Commission, and to meet the present and future demands and requirements of its cus omers and the public for electric energy used and to be used for public purposes, it is [fol. 8] necessary for the petitioner to construct, maintain and operate a dam and reservoir for the storage of said waters to the maximum elevation of 1,100 feet above mean sea level and for said purposes it is necessary that your petitioner acquire the perpetual right to impound the waters of Lake Chelan and the Chelan River and to raise the same to the maximum elevation of 1,100 feet above mean sea level and to inundate and overflow to the maximum elevation of 1,100 feet above mean sea level the following described real estate situate in the county of Chelan, State of Washington, particularly described as follows, to-wit:

"Government Lots one (1), two (2), three (3) and four (4) and the southwest quarter of the southwest quarter of Section three (3); Lots five (5) and (6), section four (4); Lot one (1) Section ten (10); Lot forty-two (42) Section Eleven (11), and Lot forty-three (43), all in Township twenty-seven (27) North, Range twenty-one (21) E. W. M., together with all shore lands of the second class, situate in front of, adjacent to, or abutting upon that portion of the Government Meander Line lying in front of the above described property, and all littoral and riparian rights thereunto belonging or appertaining, subject to the right of the Chelan Electric Company to perpetually back and hold water upon and over the shore lands situate in front of, adjacent to, or abutting upon that portion of the Government Meander Line lying in front of Lot One (1), Section ten

(10), and Lot four (4), Section three (3), Township twenty-seven (27) North, Range twenty-one (21) E. W. M., and to overflow and inundate the same to the high water mark of Lake Chelan, as granted by the order of the State Board of Land Commissioners, dated December 6th, 1909 (Application No. 7077) under and by virtue of Chapter 125, Session Laws of 1907.

VII

That the object for which this proceeding is brought is to ascertain and determine the compensation to be made in money, irrespective of any benefits from any improvement proposed by the petitioner, to the owner or owners, respectively, and to all tenants, encumbrancers and others interested for the taking or injuriously affecting the lands, real estate and other premises above described in the manner above set forth, and for a release from all liability for all damages to the lands above described, in any manner arising from the impounding and storing of the waters of said Lake Chelan and the Chelan River and raising the same to the maximum elevation of 1,100 feet above mean sea level.

VIII

That the object for which said lands, real estate and premises are sought to be appropriated, acquired and injuriously [fol. 9] affected by your petitioner is a public object and use, and that the public interest requires the prosecution of the aforesaid enterprise of your petitioner, and that said lands, real estate, premises and property sought to be appropriated and injuriously affected are required and necessary for the purposes of such enterprise. That the petitioner, has already acquired through purchase the major portion of the property necessary for said power development.

IX

That the following are the names of each and every owner, encumbrancer and person or party interested in the above described property, or any part thereof, so far as the same can be ascertained from the public records or otherwise, namely: Alice Barbee Wick and Chelan County, Washington, a municipal corporation.

X

That in order to acquire title to said property above described it is necessary for your petitioner to condemn said property and to acquire the same for the public purposes aforesaid by appropriate proceedings under and by virtue of the power of eminent domain conferred upon your petitioner in common with other like corporations in and by the laws of the State of Washington, and your petitioner makes this petition for said purposes.

Wherefore your petitioner prays that after due notice given according to law, it may be adjudged and decreed by this court that the contemplated use for which the above described land, real estate and premises are sought to be appropriated is really a public object and use, and that the public interest requires the prosecution of said enterprise, and that said land, real estate and premises are required and necessary for the purposes of said enterprise; that a jury be empaneled to ascertain the compensation to be made in money, irrespective of any benefit from any improvements proposed by your petitioner, to the above named owners of said lands for the taking and injuriously affecting the same, or in case a jury be waived, then that the com-
[fol. 10] pensation to be made as aforesaid be ascertained and determined by the court or judge thereof, and that the court apportion the damages so found among the persons entitled thereto; and that a judgment or decree be entered when said compensation shall have been determined to the effect that upon payment thereof by the petitioner full title to said property shall be at once vested in the petitioner, and for such other relief as may be proper in the premises.

Dated this 17th day of September, 1926.

Chelan Electric Company, by Post & Russell, 533 Exchange National Bank Building, Spokane, Washington. Thomas Balmer, Charles S. Albert, Edwin C. Mathias, 302 King Street Passenger Station, Seattle, Washington, Attorneys for Petitioner.

Duly sworn to by Thomas Balmer. Jurat omitted in printing.

[fol. 11] In Superior Court of Chelan County

[Title omitted]

Affidavit of Service—Filed Sept. 22, 1926

State of Washington,
County of Chelan, ss:

Bery McManus, being *v*irst duly sworn, upon oath deposes and says that at all times herein mentioned he was and now is a citizen of the United States of America and resident of the State of Washington, over the age of twenty-one years, not a party to the above entitled action and competent to be a witness therein, that on the 17th day of September, 1926, he served the annexed notice and petition upon the defendant, Chelan County, a municipal corp. by delivering in the hands of and leaving with John Godfrey, Auditor, on the date aforesaid at Wenatchee, in Chelan County, Washington, a full true and correct cop*u* of the annexed Notice & Petition.

Service, $0.60.

(Signed) Bert McManus.

Subscribed and sworn to before me this 17th day of September, 1926. J. Godfrey, Co. Auditor. (Auditor's Seal.)

[File endorsement omitted.]

[fol. 12] In Superior Court of Chelan County

Return on Non-resident—Filed Sept. 22, 1926

State of Washington,
County of Chelan, ss:

I, Bert McManus, Sheriff of Chelan County, Washington, do hereby certify that I received the annexed Notice and Petition on the 17th day of September, 1926, to serve upon the within named defendant to-wit: Alice Barbee Wick. I therefore made due and diligent — for — and was unable to find said defendant in Chelan County, Washington, and

I further certify upon information and belief that said defendant is not non-resident.

Dated at Wenatchee, Washington, this 18th day of September, 1926.

Bert McManus, Sheriff of Chelan County, Washington, by C. A. Collis, Deputy.

[File endorsement omitted.]

[fols. 13 & 14] IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

AFFIDAVIT OF PUBLICATION—Filed Sept. 22, 1926

STATE OF WASHINGTON,
County of King, ss:

Edwin C. Mathias, being first duly sworn, on oath deposes and says that he is one of the attorneys for the Chelan Electric Company, a corporation, petitioner in the above entitled action, and makes this affidavir for and on its behalf as a basis for the publication of notice to the respondent, Alice Barbee Wick; that the said Alice Barbee Wick, one of the respondents above named, is a person claiming interest in the real property described in the petition and sought to be condemned by the petitioner herein, and that said Alice Barbee Wick is a non-resident of the State of Washington.

Edwin C. Mathias.

Subscribed and sworn to before me this 20th day of September, 1926. H. F. Johnson, Notary Public in and for the State of Washington, Residing at Seattle.

[File endorsement omitted.]

[fol. 15] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

SPECIAL APPEARANCE AND MOTION TO QUASH—Filed Oct. 8, 1926

Comes now the above-named respondent Alice Barbee Wick appearing herein specially for the purpose of this motion only, and objects to the jurisdiction of this court over the person of this respondent, and moves the court to vacate, quash and set aside the pretended notice of filing and of hearing of the petition of the above-named petitioner as pretended to be served upon this respondent, for the following reasons and upon the following grounds, to-wit:

1. That the said pretended notice was and is illegally and irregularly issued.

2. That the said pretended — is not such as prescribed by law.

3. That the said pretended notice has not been served or returned as provided by law.

4. That the statutes of the State of Washington upon which the above-entitled proceeding is based do not provide for sufficient or adequate service of notice in such cases upon non-resident owners of property affected.

5. That said statutes do not provide either for personal service of such notice upon non-residents of the State of Washington or the mailing of a copy of such notice to non-residents as a prerequisite to the right of publication.

6. That the aforesaid pretended notice in the above-entitled action does not comply either in form or substance with the statutes of this state governing these proceedings, and does not constitute due notice.

7. That the effect of the service of the notice provided by the statutes of the State of Washington in this and similar proceedings against interested parties or property owners not residing within the state of Washington, and especially

upon those residing in distant states, is to permit the property or property rights of such non-resident owners to be confiscated and taken without due process of law.

8. That the act or statute of the state of Washington upon which the above-entitled proceeding is based, and more particularly that part of said act or statute providing for the notice and service thereof by publication upon non-resident owners or interested parties is contrary to the constitution of the State of Washington and is therefore unconstitutional and void.

[fol. 16] 9. That the act or statute of the state of Washington upon which the above-entitled proceeding is based, and more particularly that part of said act or statute providing for the notice and the service thereof by publication upon non-resident owners or interested parties is contrary to the constitution of the United States, and is therefore unconstitutional and void.

10. That the court has no jurisdiction over the person of this respondent.

This motion is based upon the records and files in the above pretended action, and also upon the affidavit of Adrian W. Vollmer hereto attached.

Comes now the above-named respondent, Alice Barbee Wick appearing herein specially for the purpose of this motion only and objects to the jurisdiction of the court over the person of this respondent, and further moves the court to vacate, set aside and quash the pretended service of the notice of filing and hearing of petitioner's petition upon this respondent, for the following reasons and upon the following grounds, to-wit:

1. That the said pretended notice was and is illegal and irregularly issued.

2. That the said pretended notice is not such as prescribed by law.

3. That the said pretended notice has not been served or returned as provided by law.

4. That the statutes of the state of Washington upon which the above-entitled proceeding is based do not provide

for sufficient or adequate service of notice in such cases upon non-resident owners of property affected.

5. That said statutes do not provide either for personal service of such notice upon non-residents of the state of Washington or the mailing of a copy of such notice to non-residents as a prerequisite to the right of publication.

6. That the aforesaid pretended notice in the above-entitled action does not comply either in form or substance with the statutes of this state governing these proceedings, and does not constitute due notice.

7. That the effect of the service of the notice provided by the statutes of the State of Washington in this and similar proceedings against interested parties or property owners not residing within the State of Washington, and especially upon those residing in distant states, is to permit the property or property rights of such non-resident owners to be confiscated and taken without due process of law.

8. That the act or statute of the state of Washington upon which the above-entitled proceeding is based, and more particularly that part of said act or statute providing for the notice and the service thereof by publication upon non-resident owners or interested parties is contrary to the constitution of the State of Washington, and is therefore unconstitutional and void.

9. That the act or statute of the State of Washington upon which the above-entitled proceeding is based, and more particularly that part of said act or statute providing for the notice and the service thereof by publication upon non-
[fol. 17] resident owners or interested parties is contrary to the constitution of the United States and is therefore unconstitutional and void.

10. That the court has no jurisdiction over the person of this respondent.

This motion is based upon the records and files in the above pretended action and upon the affidavit of Ardien W. Vollmer hereto attached.

(Signed) D. C. Conover, Adrien W. Vollmer, Attorneys for Respondent Alice Barbee Wick, appearing specially. Office and P. O. Address: 1489 Dexter Horton Bldg., Seattle, Washington.

Service accepted and copy received this 8th day of Oct., 1926.

E. C. Mathias, Attorney for Petitioner.

[fol. 18] In Superior Court of Chelan County

[Title omitted]

Order for Continuance—Filed Oct. 11, 1926

The above entitled proceeding came on to be heard before this court on the 11th day of October, 1926, upon the petition of the Chelan Electric Company, filed herein, Messrs. Post & Russell Charles S. Albert, and Edwin G. Matthias appearing as counsel for the petitioner, Messrs. Sumner & Adams, for Chelan County, and Messrs. D. C. Conover, Adrien W. Vollmer appearing specially for respondent Alice Barbee Wick upon a motion to quash the notice of filing and hearing of the petition and said petitioner having applied for a continuance of the hearing thereon and of said motion to the 4th day of November, 1926, and the court having heard the argument of counsel and being duly advised in the premises;

It is Ordered that the hearing upon the petition herein and upon said motion be and the same is hereby continued to and set for the 4th day of November, 1926 at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, before this court at the court house in the City of Wenatchee, State of Washington.

Done in open court this 11th day of October, 1926.

W. O. Parr, Judge.

[File endorsement omitted.]

[fol. 19] [File endorsement omitted]

In Superior Court of Chelan County

[Title omitted]

Affidavit of Publication—Filed Oct. 30, 1926

State of Washington,
County of Chelan, ss:

I, D. R. Stohl, being first duly sworn, on oath deposes and says, that I am the principal clerk of the World Pub-

lishing Co., a corporation organized and existing under the laws of the State of Washington, the owner and publisher of the Wenatchee Daily World, a legal daily newspaper printed and published at the office of the owner and publisher thereof in the City of Wenatchee, County of Chelan and State of Washington since prior to the year 1910; that I make this affidavit for and on behalf of said corporation; that said newspaper is a newspaper of general circulation in said county and state and has at all times been and now is printed and published in the English language and that the Notice in Chelan Electric Company, Petitioner, v. Alice Barbee Wick and Chelan County, respondents, No. —, a printed copy of which is hereunto attached was published in said newspaper proper and not in supplement form, in the regular and entire edition of said paper once each week for a period of three consecutive weeks, beginning on the 23rd day of September 1926 and ending on the 7th day of October 1926 both dates inclusive, and that said newspaper was regularly distributed to its subscribers during all of said period.

That the full amount of the fee charged for the foregoing publication is the sum of $21.35.

D. R. Stohl.

Subscribed and sworn to before me this 8th day of [fol. 20] October, 1926. R. S. Ludington, Notary Public in and for the State of Washington, Residing at Wenatchee, Chelan County. (Notary Seal.)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF CHELAN

No. 7391

CHELAN ELECTRIC COMPANY, a Corporation, Petitioner,
vs.
ALICE BARBEE WICK and CHELAN COUNTY, WASHINGTON, a Municipal Corporation, Respondents

NOTICE

The State of Washington to Alice Barbee Wick and Chelan County, Washington, a municipal corporation

You and each of you are hereby notified that the petitioner, Chelan Electric Company, a corporation, has filed

in the above entitled court, with the Clerk thereof, a petition showing that it is a public service corporation authorized to appropriate lands, real estate, premises and property for the purpose of constructing a reservoir, dam and power plant to develop and utilize for railroad, lighting and other public purposes, the water power afforded by Lake Chelan and the Chelan River; that the petitioner has permits from the Supervisor of Hydraulics of the State of Washington to appropriate and store for beneficial uses substantially all the waters of Lake Chelan and the Chelan River, and a license from the Federal Power Commission under and by virtue of the Act of Congress approved June 10th, 1920, known as "The Federal Water Power Act," for the construction, operation and maintenance of the dams, reservoirs and other project works necessary or convenient for the development, transmission and utilization of the water power afforded by said Lake Chelan and the Chelan River and by raising and storing the waters thereof to the maximum elevation of 1,100 feet above mean sea level; that in order to develop and apply to the beneficial public uses above mentioned the waters of Lake Chelan and the Chelan River it is necessary for the petitioner to appropriate and acquire the perpetual right to impound the waters of Lake Chelan and the Chelan River and to raise the same to the maximum elevation of 1,100 feet above mean sea level and to inundate and overflow to the maximum elevation of 1,100 feet above mean sea level the following described real estate situate in the County of Chelan, State of Washington, to-wit:

Government Lots one (1), two (2), three (3) and four (4), and the Southwest Quarter of the Southwest Quarter of Section three (3); Lots five (5) and six (6), Section four (4); Lot one (1), Section ten (10); Lot forty-two (42), Section eleven (11), and Lot forty-three (43), all in Township twenty-seven (27) North, Range twenty-one (21) E. W. M., together with all shore lands of the second class, situate in front of, adjacent to, or abutting upon that portion of the Government Meander Line lying in front of the above described property, and all littoral and riparian rights thereunto belonging or appertaining, subject to the right of the

Chelan Electric Company to perpetually back and hold water upon and over the shore lands situate in front of, adjacent to, or abutting upon that portion of the Government Meander Line lying in front of Lot one (1), Section ten (10), and Lot four (4), Section three (3), Township twenty-seven (27) North, Range twenty-one (21) E. W. M., and to overflow and inundate the same to the high water mark of Lake Chelan, as granted by the order of the State Board of Land Commissioners, dated December 6th, 1909 (Application No. 7077), under and by virtue of Chapter 125, Session Laws of 1907.

That the object of said proceeding is to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by the petitioner, to the owner or owners, respectively, and to all tenants, encumbrancers and others interested, for the taking or injuriously affecting the lands, real estate and premises above described, in the manner set forth in said petition, and for a release from all liability for all damages to said lands, real estate and premises, in any manner arising from the impounding and storing of the waters of said Lake Chelan and the Chelan River and raising the same to the maximum elevation of 1,100 feet above mean sea level, and to obtain a decree that the contemplated use for which said lands, real estate, premises and property are sought to be appropriated is a public object and use and that the public interest requires the prosecution of the aforesaid enterprise of the petitioner, and that said lands real estate, premises and property sought to be appropriated and injuriously affected are required and necessary for the purposes of such enterprise.

Notice is further given that on the 11th day of October, 1926, at the hour of 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the petitioner will present said petition and proof in support thereof to said Superior Court for hearing and determination and for the fixing of a time at which a jury shall be called to determine

the amount of compensation to be made and the parties to whom the same shall be paid.

Dated this 17th day of September, 1926.

Chelan Electric Company, by Post & Russell, 533 Exchange National Bank Bldg., Spokane, Washington. Thomas Balmer, Charles S. Albert, Edwin C. Matthias, 302 King Street Passenger Station, Seattle, Washington, Attorneys for Petitioner.

[fol. 21] IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

NOTICE OF PETITION AND BOND FOR REMOVAL—Filed Oct. 30, 1926

To the above-named petitioner and to Post & Russell, Thomas Balmer, Charles S. Albert, and Edwin C. Mathias, its attorneys:

You and each of you will please take notice that Alice Barbee Wick, one of the above-named respondents, appearing herein specially for the purpose only of removing the above-entitled cause to the District Court of the United States for the Eastern District of Washington, Northern Division, and that on Saturday, the 30th day of October, 1926, at 9:30 a. m., of said day, said respondent, Alice Barbee Wic*h*, will file in the above entitled court her petition and bond herein as required by law, for the removal of said cause from the above-entitled court to the District Court of the United States for the Eastern District of Washington, Northern Division, and also a bond in the sum of Five Hundred Dollars ($500.00) given on such removal according to law and the requirements of the statutes in such case made and provided, and copies of said bond and petition are herewith served, and that after the filing of said petition and bond, to-wit: at the hour of 9:30 o'clock A. M., of the aforesaid day, or as soon thereafter as counsel can be heard, the said respondent will present and call to the attention of the said Superior Court of the State of Washington for Chelan County, at the court house of

said Chelan County, in Wenatchee, Washington, the said petition and bond, and move the said Superior Court to accept said petition and bond and to approve said bond, and for an order of removal of said cause from the above-[fol. 22] entitled court to the said District Court of the United States for the Eastern District of Washington, Northern Division, said motion for removal to be made upon the grounds as stated in said petition and upon said petition and bond so filed and presented.

D. C. Conover, Adrien W. Vollmer; Attorneys for said Petitioner and Respondent, appearing specially, as aforesaid.

Copy of the foregoing notice and of the bond and petition in the above entitled cause received this 22 day of October, 1926.

Charles S. Albert, Post & Russell, Thomas Balmer, E. C. Matthias, Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 23] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION—Filed Oct. 30, 1927

Your petitioner, Alice Barbee Wick, one of the respondents above-named, and appearing specially for the purpose only of the removal of the above-entitled cause, respectfully shows to this Honorable Court that she is one of the respondents in this suit, which is of a civil nature, and that the matter now in dispute in this cause exceeds the sum or value of $3,000.00, exclusive of interest and costs.

Your petitioner shows to this Honorable Court that there is in said suit a separable controversy which is wholly between citizens of different states and which can be fully

determined as between then, to-wit: a separable controversy between your said petitioner herein, who evers that she was at the time of the bringing of this suit and ever since has been and still is a citizen and resident of the State of Pennsylvania, and not a resident of the State of Washington, and that the said Chelan Electric Company, a corporation organized and existing under the laws of the State of Washington petitioner in the above-entitled proceeding or suit, who as your petitioner herein avers was then and ever since has been and still is a citizen of the State of Washington.

That the said controversy is of the following nature, viz: A proceeding by petition, for the purpose as alleged therein, "to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by the petitioner to the owner or owners, respec-[fol. 24] tively, and to all tenants, encumbrances and others interested for the taking or injuriously affecting the lands, real estate and other premises," in said petition described and hereinafter described, "for a release from all liability for all damages to the lands in any manner arising from the impounding or storing of the waters of Lake Chelan and the Chelan River, and raising the same to the maximum elevation of eleven hundred feet above mean seal level" by building a dam and doing other work necessary for the conversion of said Lake or River into a storage reservoir for the said impounding of said water.

The lands, real estate and other premises proposed to be taken or injuriously affected are situate in Chelan County, State of Washington, and are particularly described in said petition as follows:

Government Lots one (1) two (2), three (3) and four (4) and the southwest quarter of the southwest quarter of section three (3); Lots five (5) and six (6) section four (4); Lot one (1) section ten (10); Lot forty-two (42), Section eleven (11), and Lot forty-three (43); all in Township twenty-seven (27) North, Range twenty-one (21) E. W. M., together with all shore lands of the second class, situate in front of, adjacent to, or abutting upon that portion of the Government Meander Line lying in front of the above-described property, and all littoral and riparian rights thereunto belonging or appertaining.

That it is further claimed in the said petition of the said petitioner, Chelan Electric Company, (and is a part of said controversy) that said appropriation is sought subject to an alleged right on its part to perpetually back and hold water upon and over the shore lands situate in front of, adjacent to, or abutting upon that portion of the Government Meander Line lying in front of said Lot one (1), Section ten (10) and said Lot Four (4), Section three (3), Township twenty-seven (27) North, Range twenty-one (21) E. W. M. and to overflow and inundate the same to the highwater mark of Lake Chelan, alleged to have been granted by the order of the State Board of Land Commissioners, dated December 6th, 1909, (application No. 7077) under and by virtue of Chapter 125, session Laws of 1907. [fol. 25] That the further purpose of said petition as alleged therein is to have the "contemplated use for which the above-described land, real estate and premises are sought to be applied" adjudged and decreed by said Superior Court as a Public object and use, and claiming that the public interest requires the prosecution of said enterprise.

That the other respondent in said cause is the said Chelan County, Washington, a municipal corporation and a citizen of the State of Washington; that said Chelan County is not a tenant, lienor or encumbrancer, and has no right, title, interest or estate whatsoever in any of the land, real estate or other premises owned by the said Alice Barbee Wick; that there are no taxes or other amounts due and owing by said Alice Barbee Wick to said Chelan County, and that the controversy between said Chelan Electric Company and said Alice Barbee Wick is a separable and distinct controversy between said Chelan Electric Company and said Alice Barbee Wick, your petitioner herein, who are citizens and residents of different states, as aforesaid, which can be wholly determined between said Chelan Electric Company and said Alice Barbee without the presence in this action of said other respondents, viz: said Chelan County, Washington, a municipal corporation.

That your petitioner desires to remove said cause to the United States District Court for the Eastern District of Washington, Northern Division, and your petitioner makes and files herewith a bond in the sum of Five Hundred

($500.00), with good and sufficient sirety for her entering in said District Court of the United States for the Eastern District of Washington, Northern Division, within thirty (30) days from the date of the filing of this petition a certified copy of the record of said cause, and for paying all costs that may be awarded by said District Court if it shall hold that said suit was wrongfully or improperly removed thereto.

[fol. 26-28] Wherefore your petitioner prays that this Honorable Court proceed no further herein except to accept this petition and said bond, as required by law, and to order said cause to be removed to said District Court of the United States for the Eastern District of Washington, Northern Division, and to order a transcript of the record herein be prepared and certified for transmission to said District Court as provided by law, and to stay all futher proceedings herein.

D. C. Conover, Adrien W. Vollmer, Attorneys for said Petitioner Herein, appearing specially, as aforesaid.

Office and Post Office address: 1489-90 Dexter Horton Building, Seattle, Washington.

Duly sworn to by Adrien W. Vollmer. Jurat omitted in printing.

[fols. 29-31] In Superior Court of Chelan County

[Title omitted]

Objections to Removal to the United States Court—Filed Oct. 30, 1926

Now comes the above-named petitioner, Chelan Electric Company, a corporation, on the 30th day of October, 1926, at 9:30 o'clock in the forenoon of said day, and presents its objection to the above entitled court to the remocal of this cause to the District Court of the United States in and for the Eastern District of Washington, Northern Division, upon the following grounds:

1. That said United States District Court has no jurisdiction over this controversy of the parties hereto.

2. That the Petition for Removal presented at this time to this court was not filed in this court within the time limited by law.

3. That the controversy herein is one not wholly between citizens of different states.

4. That said controversy is not a separable controversy.

5. That no notice of hearing upon the petition for removal has been served upon Chelan County.

6. That said Chelan County is a lienor and encumbrancer upon and has the right, title and interest and estate in the lands, real estate and premises owned by the said Alice Barbee Wick and sought to be taken in these proceedings.

7. The amount in controversy does not exceed, exclusive of interest and costs, the sum of three thousand dollars ($3,000.00.)

Post & Russell, Charles S. Albert, Edwin C. Mathias,
Attorneys for Chelan Electric Company.

[File endorsement omitted.]

[fol. 32] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

ORDER REMOVING CAUSE—Filed Oct. 30, 1926

The above entitled action came on to be heard before the above entitles court on the date hereinbelow named, upon the application of Alice Barbee Wick, one of the respondents herein, for the removal of said cause to the District Court of the United States for the Eastern District of Washington, Northern Division, and the above named Chelan Electric Company having appeared and objected to the removal of said cause as in the petition for removal prayed; and it appearing that the petitioner at the time of the filing of said petition herein on this 30th day of October, 1926,

offered its bond in the sum of five hundred dollars ($500.00) as provided by law, with the United States Fidelity & Guaranty Company as surety, and that the United States Fidelity & Guaranty Company is good and sufficient surety; and it appearing to this court that it has no discretion to do other than grant the prayer of said petition for removal; Now therefore,

It is ordered and adjudged that this court does hereby accept and approve said bond and accept said petition, and does order that this cause be removed to the United States District Court of or the Eastern District of Washington, Northern Division, pursuant to the statutes of the United States, and the clerk of this court is hereby directed to make up a certified copy of the record in this cause for transmission to the clerk of said District Court of the United States forthwith, and that no further proceedings be had in the above entitled cause in this court.

Done in open court this 30th day of October, 1926.

W. O. Parr, Judge.

[fol. 33] [File endorsements omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

CHELAN ELECTRIC COMPANY, a Corporation, Petitioner,

vs.

ALICE BARBEE WICK and CHELAN COUNTY, WASHINGTON, a Municipal Corporation, Respondents

MOTION TO REMAND—Filed Nov. 1, 1926; in Superior Court, Nov. 4, 1926

Now comes the above named petitioner and appearing specially and for the sole purpose of making this motion, moves the court to remand this proceeding to the Superior Court of the State of Washington, in and for Chelan County, upon the following grounds:

First. That this court has no jurisdiction over this controversy or the parties hereto.

Second. That the petition for removal was not filed in said Superior Court within the time limited by law.

Third. That the controversy herein is not one wholly between citizens of different states.

Fourth. That the controversy herein between this petitioner and the said Alice Barbee Wick is not a *spe*arable and distinct controversy from that between said Chelan Electric Company, and Chelan County and that the controversy between the petitioner and the said Alice Barbee Wick cannot be wholly determined, or determined at all, without the presence in this action of the said Chelan County.

Fifth. That no notice of the hearing upon the petition for removal was ever served on Chelan County.

Sixth. That the said Chelan County is a lienor and encumbrancer upon and has a right, title, interest and estate in the land, real estate and premises owned by the said Alice Barbee Wick and sought to be taken in these proceedings.

Said motion will be made upon the transcript on file [fols. 34 & 35] herein, upon the affidavit of Edwin C. Matthias hereto attached and upon such other affidavits as may be presented to this court at the time the motion is heard.

The petitioner herein further prays the court for an order prescribing that this motion shall be heard on the record herein and upon affidavits, and for an order prescribing a shorter period for the service of this notice and moving papers and asks that the hearing of said motion be fixed for the 3rd day of November, 1926, at ten o'clock in the forenoon, upon the ground that an exigency and emergency exists, which requires the shortening of such period.

Post & Russell, Charles S. Albert, Edwin C. Matthias, Attorneys for Chelan Electric Company, appearing specially and for the sole purpose of moving to remand said cause to the above-mentioned State court.

Chelan County appearing specially and for the sole purpose of moving the above entitled court to remand said cause to the above mentioned state court, joins in the fore-

going motion to remand and asks the court, upon the grounds therein stated and upon the additional ground that the amount in controversy does not exceed the sum of Three Thousand Dollars, exclusive of interest and costs, to remand this proceeding to the Superior Court of the State of Washington, in and for Chelan County.

Sam R. Sumner, J. A. Adams, Attorneys for Chelan County, appearing specially and for the sole purpose of moving to remand said cause to the above-mentioned State court.

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF EDWIN C. MATTHIAS

STATE OF WASHINGTON,
County of King, ss:

Edwin C. Matthias, being first duly sworn, on oath deposes and saus that he is one of the attorneys for the petitioner, Chelan Electric Company, herein; that he has read the motion to remand herein and knows the contents thereof, and that the same is true in fact and is well founded in law; that said motion is not made for the purpose of delay.

That the above entitled proceeding is one of thirty-three similar proceedings returnable before the Superior Court of the State of Washington, in and for Chelan County, on the 4th day of November, 1926; that the court has fixed that time as the date for the hearing upon the question whether the contemplated use for which the land, real estate and premises described in the petition herein, and in the petitions in the said thirty-three similar proceedings, is sought to be appropriated is really a public use and whether the public interest requires the prosecution of the enterprise of said petitioner, and whether the land, real estate and premises sought to be appropriated are required and necessary for the purpose of such enterprise; that precisely the same question is involved in each of the said thirty-

three proceedings requiring the introduction of the same evidence in every instance, the only difference in the proceedings being in the description of the property sought to be taken in each instance; that the evidence necessary to be presented involves the production of numerous ex- [fol. 37] hibits prepared at considerable expense, consisting of certified copies of lengthy articles and amended articles of incorporation of different companies, certified license certificates, certified tariffs of rates of two companies on electricity filed with the Department of Public Works of the State of Washington, certified copies of hydraulic permits and certified copy of a license from the Federal Power Commission to the petitioner for the construction of the Chelan project, certified exemption certificate, blue prints showing lands involved, certified copies of lengthy contracts between Chelan Electric Company, the Great Northern Railway Company and the Washington Water Power Company and between the Washington Water Power Company and the Great Northern Railway Company, certified copies of the annual reports of the Department of Public Works of the State of Washington, specially prepared maps of the territory served by The Washington Water Power Company, special graphs of uses of power, and other documentary evidence, and at said hearing on said question the attendance will be required of numerous witnesses from Spokane, Seattle, Portland, Central Washington and other points, all of whom are busily engaged in occupations necessarily requiring their personal attention, some of whom are expert witnesses and many of whom will attend at considerable expense to petitioner, and it is very difficult to arrange a time convenient for all such witnesses to attend. That the judge of the said Superior Court of Chelan County has advised the litigants in all said cases that one hearing will be held on November 4th, in which testimony will be taken in all thirty-three cases, including the above entitled cause; that if said cases are not heard together the expense and inconvenience to witnesses and court will be multiplied by the number of such separate hearings so held, and that unnecessary expenses will be incurred if separate hearings are held which must necessarily be added to the cost of the public enterprise and eventually paid by the public and that the removal of this

[fol. 38] cause to this court was intended by respondent Wick and her attorneys to be for the purpose only of vexatious delay and to prevent petitioner herein from obtaining an early hearing on said question in all of said thirty-three proceedings.

Affiant further says that he is informed and believes the fact to be that no notice of the hearong on the petition for removal herein was ever served upon Chelan County, the other respondent herein, and that said Chelan County has not been served with copies of the said notice of removal, petition on removal or bond on removal herein.

Affiant further says that he has caused inquiry to be made and has ascertained that the County of Chelan has levied, in accordance with the laws and the statutes of the State of Washington taxes upon the property involved herein and described in the petition herein, in the sum of $842.52; that said taxes are due and payable on or before the 31st day of May, 1927, and that the said taxes so levied against the property of the respondent Wick herein by the respondent Chelan County are now, at the time of the commencement of this action were, and according to the laws and statutes of the State of Washington, ever since the first day of March, 1926, have been a lien and encumbrance upon said real estate involved in this proceeding and described in the petition herein. That under the laws and statutes of the State of Washington each and every owner, encumbrancer and other person or party interested in the property sought to be taken under eminent domain proceedings is a necessary and indispensable party to such proceeding, and that Chelan County in whose favor said lien for said taxes exists, is an encumbrancer and party interested in the property which is sought to be appropriated by the petitioner herein, and as such is a necessary and indispensable party.

Affiant further says that the time for the respondents, and each of them, to appear or plead or answer in this pro-[fol. 39] ceeding expired on the 11th day of October, 1926, and that on said 11th day of October, 1926, the respondent Chelan County appeared generally and the respondent Wick appeared specially by serving and filing motions directed against the notice and petition herein for an order of the court quashing the said notice and petition. That

the respondent Wick did not serve or file on the said 11th day of October, 1926, or any time prior thereto, upon the petitioner herein or its attorneys, its petition for removal or bond on removal or notice of hearing on said petition for removal, and the said petition and bond on removal and notice of hearing on said petition for removal on the part of the respondent Wick was not served upon the petitioner herein, or its attorneys, until the 22nd day of October, 1926, or eleven days after the time had expired within which said respondents should appear, plead or answer in said cause.

Edwin C. Matthias.

Subscribed and sworn to before me this 29th day of October, 1926. H. F. Jones, Notary Public in and for the State of Washington, Residing at Seattle. (Notary Seal.)

[fols. 40 & 41] In United States District Court

[Title omitted]

Order to Show Cause—Filed Nov. 1, 1926

Upon reading the motion of the petitioner, Chelan Electric Company, and the affidavits in support thereof, and upon the application of said petitioner appearing by Charles S. Albert, its attorney, and it appearing to the court that an exigency and emergency exists whereby the time for service of notice of motion and moving papers should be shortened;

It is ordered that the hearing upon this motion of the petitioner herein to remand this cause to the Superior Court of Chelan County, State of Washington, be, and the same hereby is fixed to be heard by this court at ten o'clock in the forenoon, November third, 1926, in the Federal Building in the City of Spokane, and that copies of said motion to remand and moving papers and a copy of this order be served upon the attorneys for respondent, Alice Barbee Wick on this first day of November, 1926.

It is further ordered that said motion shall be heard on the transcript of record herein, the said motion to remand

and moving papers and such affidavits as may be served and filed in this court prior to the time fixed for the hearing of said motion.

J. Stanley Webster, Judge.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION TO REMAND—Filed Nov. 3, 1926

STATE OF WASHINGTON,
County of Chelan, ss:

A. M. Anderson, being duly sworn says that he is assistant right of way land and tax commissioner for the Great Northern Railway Company, having his office and residence in Spokane, Washington, that he has had charge of acquiring the overflow rights and land for the Chelan Electric Company at and around Lake Chelan, that the familiarity of deponent with land values about Lake Chelan extends over a period of several years and is of an extensive nature, deponent having personally, during said time, made over 350 separate purchases of land and overflow rights at and around Lake Chelan.

That deponent knows the land of the respondent Alice Barbee Wick, described in the petition herein; that, except as hereinafter described, the entire cultivated and improved land of the said respondent is located several hundred feet above the proposed high water elevation of Lake Chelan; that the said land has a frontage on Lake Chelan of approximately two miles; that at least one and one-half miles of the said frontage is a rocky bluff, the walls of which rise almost perpendicularly from the shores of the lake; that the said rocky frontage is wholly without any value and will not be affected or in any manner damaged by the contemplated raising of the water of Lake Chelan; that the balance of said lake frontage is rocky and precipitous, ex-
[fol. 43] cept for a small flat located near the mouth of First Creek, the overflow area of which does not exceed two and one-half acres; that the entire land of the respondent

Alice Barbee Wick, subject to overflow, is wholly unimproved, except for some small, inexpensive summer camps, located on said flat, and some old delapidated and abandoned shacks of no value.

That, in the opinion of dependent, the total value of the land and rights to be acquired herein, including the damage if any to the land of the respondent Alice Barbee Wick not taken or overflowed does not exceed the sum of $1,500.00; that the total amount in controversy herein is less than $3,000, and, in the opinion of deponent, does not exceed the sum of $1,500.00.

A. M. Anderson.

Subscribed and sworn to before me this 30th day of October, 1926. Ernest E. Sargeant, Notary Public in and for the State of Washington, Residing at Spokane. (Seal.)

[File endorsement omitted.]

[fol. 44] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF R. A. SCHEBLE—Filed Nov. 3, 1926.

STATE OF WASHINGTON,
County of Chelan, ss:

R. A. Scheble, being first duly sworn on his oath doth depose and say: That he is now and has been for more than five years last past, the Assessor of Chelan County; that he has examined the Notice and Petition of the Chelan Electric Company in the condemnation proceedings now pending in the above entitled court, and which has been removed to said Court from the Superior Court of the State of Washington in and for Chelan County, that he is well acquainted with the property described therein; that as such assessor he has, as a part of his regular duties, extended upon the tax rolls of said county the tax levied upon said property

for the year 1926; that the amount of taxes so levied and extended is the sum of $842.52; that said taxes are due and payable on or before the 31st day of May, 1927, and that the said taxes so levied against the said property of the above named Alice Barbee Wick by Chelan County are now and ever since the first day of March, 1926, have been a lien and an encumbrance upon the said property; and that the said Chelan County is an encumbrancer upon said property.

R. A. Scheble.

Subscribed and sworn to before me this 30th day of October, 1926. J. A. Adams, Notary Public in and for the State of Washington, Residing at Wenatchee Therein.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. A. ADAMS—Filed Nov. 3, 1926

STATE OF WASHINGTON,
County of Chelan, ss:

J. A. Adams being first duly sworn, on his oath deposes and says that he is one of the attorneys for the above named Chelan County, and has been during the entire pendency of these proceedings; that no notice of a hearing upon the petition of Alice Barbee Wick to remove said cause from the Superior Court of the State of Washington in and for Chelan County to the District Court of the United States in and for the Eastern District of Washington, Northern Division, was ever served upon the said Chelan County, or upon this affiant, or Sam R. Sumner, the other attorney for said Chelan County at any time, either before the date of the hearing of said petition of removal, to-wit: October 30th, 1926, or on said date, or subsequent thereto.

J. A. Adams.

Subscribed and sworn to before me this 30th day of October, 1926. W. M. Emerson, Notary Public in and for the State of Washington, Residing at Wenatchee.

[File endorsement omitted.]

[fol. 46] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER REMANDING CAUSE—Filed Nov. 3, 1926

The above-entitled matter came duly on to be heard before this court on the third day of November, 1926, at 10:00 o'clock in the forenoon upon the special appearance and motion by the Chelan Electric Company, and Chelan County, Washington, to remand this cause to the superior court of the state of Washington in and for Chelan County, Charles S. Albert appearing specially for the purpose of making said motion to remand on behalf of said Chelan Electric Company and said Chelan County, Washington, and Terry Grant, and Adrien W. Vollmer appearing on behalf of Alice Barbee Wick in opposition thereto; and the court having duly considered the record on file and the arguments of counsel, and being duly advised in the premises;

It is ordered, that said motion to remand be and the same is hereby granted, and the clerk of this court is hereby directed to forthwith transmit the record in this cause and the proceedings therein to the superior court of the State of Washington in and for Chelan County, and said cause is hereby remended to said superior court for such other and further proceedings as may be necessary to be taken therein; and

It is further ordered, that the said Chelan Electric Com-
[fol. 47] pany and the said Chelan County Washington, do have and recover of the said Alice Barbee Wick their costs and disbursements herein provided by law.

J. Stanley Webster, Judge.

[fol. 48] In Superior Court of Chelan County

[Title omitted]

Order of Continuance—Filed Nov. 4, 1926

The above-entitled proceeding came on to be heard before this court on the 11th day of October, and was on that date continued to the 4th day of November, 1926, and now upon the petition of the Chelan Electric Company, filed herein, Post & Russell, Charles S. Albert and Edwin C. Mathias appearing as attorneys for the petitioner Sumner & Adams as attorneys for Chelan County and D. C. Conover and Adrien W. Vollmer, as attorneys for respondents Alice Barbee Wick, objecting to continuance and said petitioner having applied for a continuance of the hearing thereon to the 6th day of December, 1926, and the court having heard the arguments of counsel and being fully advised in the premises;

It is ordered, that the hearing upon the petition herein be, and the same is hereby continued to and set for the 6th day of December, 1926, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, before this court at the court house in the City of Wenatchee, State of Washington, to which ruling, counsel for Alice Barbee Wick excepts which exception is allowed.

Done in open court this 4 day of November, 1926.

W. O. Parr, Judge.

[File endorsement omitted.]

[fol. 49] In Superior Court of Chelan County

[Title omitted]

Order for Continuance—Filed Dec. 6, 1926

The above-entitled proceeding came on to be heard before this court on the 6th day of December, 1926, upon the petition of the Chelan Electric Company, filed herein, Messrs. Post & Russell, Charles S. Albert and Edwin C.

Mathias appearing as attorneys for the petitioner, Messrs. Sumner & Adams for Chelan County, and said respondent Alice Barbee Wick appearing specially by her attorneys Messrs. D. C. Conover and Adrien W. Vollmer, upon a motion to quash the notice of filing and hearing of the petition, and said petitioner having applied for a continuance of the hearing thereon and of said motion to the 7th day of February 1927, the said respondent Alice Barbee Wick objecting thereto, and the court having heard the argument of counsel and being duly advised in the premises;

It is ordered, that the hearing upon the petition herein and upon said motion be, and the same is hereby continued to and set for the 7th day of February 1927, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, before this court at the court house in the city of Wenatchee, State of Washington, to which ruling counsel for Alice Barbee Wick, excepts and exception is allowed.

Done in open court this 6th day of December, 1926.

W. O. Parr.

[File endorsement omitted.]

[fol. 50] In Superior Court of Chelan County

[Title omitted]

Order for Continuance—Filed Feb. 7 ,1927

The above entitled proceedings came on to be heard before this court on the 7th day of Fabruary, 1927, upon the application of the said Petitioner for a continuance of the hearing formerly set for February 7, 1927, and Messrs. Post & Russell, Charles S. Albert and Edwin C. Mathias appearing as attorneys for the petitioner, Messrs. Sumner & Adams for Chelan County, and said respondent Alice Barbee Wick appearing specially by her attorneys Messrs. D. C. Conover and Adrien W. Vollmer objecting to said continuance, and the court having heard the argument of counsel and being duly advised in the premises;

It is ordered that the hearing upon the petition herein and upon said motion be and the same is hereby continued

and set for the 28th day of February, 1927 at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, before this court at the court house in the city of Wenatchee, State of Washington, to which ruling counsel for Alice Barbee Wick excepts and her exception is allowed.

Done in open court this 7 day of February, 1927.

W. O. Parr, Judge.

[File endorsement omitted.]

[fol. 51] In Superior Court of Chelan County

[Title omitted]

Special Appearance and Demurrer

Comes now the above named respondent, Alice Barbee Wick, the above entitled court having heretofore granted her petition to remove this cause to the District Court of the United States for the Eastern District of Washington, Northern Division and the said United States District Court having heretofore remanded this cause to the above-entitled court on the application of petitioner, Chelan Electric Company, a corporation, and the said Superior Court of the State of Washington in and for the County of Chelan having overruled and denied her motions to vacate, quash and set aside the pretended service of the notice in this action, and to quash, vacate and set aside the pretended notice in this action and the said respondent Alice Barbee Wick not having waived her right to petition for the removal of this cause to the said United States District Court, or her said motions to quash, or either of them and still reserving and retaining her special appearance and her right to urge such removal and her right to question the jurisdiction of this court, and so specially appearing, demurs to the pretended petition on the following grounds, and each of them, to-wit:

1. That the said pretended petition does not state facts sufficient to constitute a cause of action.

2. That the said pretended petition does not state facts sufficient to entitled the said petitioner to the relief asked.

3. That the said petitioner has no legal capacity to sue.

4. That the said petition does not state facts sufficient to show that the petitioner is interested in this proceeding or that petitioner itself intends to use the property which it is seeking to condemn, and said petition does not show that the petitioner is the real party in interest.

5. That Chapter 159 of the Session Laws of the State of Washington for 1907, Sections 1, 2, 3, and 4, found on pages 349 and 350 are in violation of Article I, Sections 2, 3, 16 and 32, and are in violation of Article II Section 19 of the Constitution of the State of Washington, and each of them; [fol. 52] and are also in violation of other provisions of the constitution of the State of Washington.

6. That Chapter 159 of the Session Laws of said State of Washington for the year 1907, Sections 1, 2, 3, and 4, found on pages 349 and 350 are in violation of Amendment Article XIV, Section 1, and Amendment Article V of the Constitution of the United States, and each of them; and are also in violation of other provisions of the constitution of the United States.

7. That the said pretended petition shows that this court has no jurisdiction over the subject matter of this action or proceeding.

8. That the court has no jurisdiction over the person of the said respondent, Alice Barbee Wick.

9. That the statutes of the State of Washington relating to condemnation proceedings by corporations of the character of petitioner, under which these proceedings are instituted, are unconstitutional and void, especially as to nonresidents, being in violation of Article I, sections 2, 3, 16 and 32, and Article II, Section 19, of the Constitution of the State of Washington, and other provisions of the constitutions of said state of Washington.

10. That the statutes of the state of Washington relating to condemnation proceedings by corporations of the character of petitioner, under which these proceedings are instituted, are unconstitutional and void, especially as to nonresidents, being in violation of Article III Section 2, Arti- IV, Section 2, Amendment Article V, and Amendment Ar-

ticle XIV, Section 1, of the Constitution of the United States, and each of them, and are also in violation of other provisions of the Constitution of the United States.

11. That these proceedings are unconstitutional and void as to this respondent.

12. That there is a defect or misjoinder of parties respondent.

[fol. 53] Adrien W. Vollmer, Peters & Powell, Attorneys for Respondent Alice Barbee Wick, appearing specially.

Office: 1489-90 Dexter Horton Building, Seattle, Washington.

Service accepted and copy received this 28th day of Feb., 1927.

Post & Russell, Charles S. Albert, Edwin C. Mathias, Attorneys for Petitioner.

[fol. 54] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

SPECIAL APPEARANCE AND MOTION TO MAKE MORE DEFINITE AND CERTAIN—Filed Feb. 28, 1927

Comes now the above named respondent, Alice Barbee Wick, the above entitled court hacing heretofore granted her petition to remove this cause to the District Court of the United States for the Eastern District of Washington, Northern Division, and the said United States District Court having heretofore remanded this cause to the above entitled court on the application of the petitioner, Chelan Electric Company, a corporation, and the said Superior Court of the State of Washington in and for the said County of Chelan having overruled and denied her motions to vacate, quash and set aside the pretended service of the notice in this action, and to quash, vacate and set aside the

pretended notice in this action, and the said respondent, Alice Barbee Wick not having waived her right to petition the removal of this cause to the said United States District Court, or her said motions to quash, or either of them, and still reserving and retaining her special appearance and her right to urge such removal and her right to question the jurisdiction of this court, and ao specially appearing, makes and submits the following motions:

1. Moves the court to require the petitioner to make paragraph VI of its pretended petition to be more definite and certain by setting forth therein with reasonable certainty the portion or portions of the real estate described in said paragraph VI which the petitioner seeks to inundate or overflow as in said paragraph stated.

2. Moves the court to require the petitioner to make paragraph VI of said pretended petition more definite and certain by setting forth specifically the portion or portions of Government Lots 1, 2, 3, and 4, and the southwest quarter of the southwest quarter of Section 3, Lots 5 and 6, Section 4, Lot 1, Section 10, Lot 42 Section 11, and lot 43 and each of said several parcels of land, all in Township 27 North, Range 21 E. W. M., situated in said Chelan County, Washington, which said petitioner seeks to inundate or overflow, as in said paragraph referred to.

3. Moves the court to require the said petitioner to make [fol. 55] said paragraph VI of said pretended petition to be more definite and certain by setting forth specifically the portion or portions of the shore lands therein mentioned which petitioner seeks to inundate or overflow as therein referred to.

4. Moves the court to require the petitioner to make paragraph VI of said pretended petition more definite and certain by setting forth specifically by proper metes and bounds the portion or portions of the real estate referred to in said paragraph VI which petitioner seeks to inundate or overflow as therein referred to.

5. Moves the court to require the petitioner to make said pretended petition more definite and certain by setting specifically forth whether petitioner seeks to condemn and acquire the fee in or to any part of land belonging to this

respondent purported to be described or mentioned in said petition, or whether petitioner seeks to condemn and acquire solely an easement of flowage thereon.

6. In the event the court should deny the above motions numbered 1 to 4 inclusive, but without waiving the same, or either of them, respondent moves the court to require petitioner to furnish a bill of particulars setting out the information requested in said motions.

The foregoing motions are based upon the records and files in the above-entitled cause.

Adrien W. Vollmer, Peters & Powell, Attorneys for Respondent Alice Barbee Wick, appearing specially.

Office and Post Office address: 1489 Dexter Horton Building, Seattle, Washington.

Service accepted and copy received this 28th day of Feb., 1927.

Post & Russell, C. S. Albert, E. C. Mathias, Attorneys for Petitioner.

[fol. 56] IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

ORDER DENYING MOTIONS TO QUASH—Filed Feb. 28, 1927

This cause came regularly on for hearing on this 28 day of Feb. 1927 before the court upon the special appearance of the above-named respondent Alice Barbee Wick, on her motions to vacate, quash and set aside the notice of the above-named petitioner and the service thereof, and the court having considered the motion, and being fully advised of the law and the premises, it is

Ordered, That the motion of the above-named respondent, Alice Barbee Wick, to vacate, quash and set aside the notice of said petitioner is denied, to which ruling of the court the said respondent excepts and exception is hereby allowed.

It is further ordered, That the motion of the said respondent Alice Barbee Wick, to vacate, quash and set aside

the service of the said notice be and the same hereby is denied, to which ruling of the court the said respondent excepts and exception is allowed.

Done in Open Court this 28 day of February, 1927.

W. O. Parr, Judge.

[File endorsement omitted.]

[fol. 57] In Superior Court of Chelan County

[Title omitted]

Order Overruling Demurrer—Filed Mar. 1, 1927

This cause came regularly on for hearing upon the demurrer of the above-named respondent, Alice Barbee Wick, the respective parties appearing by their respective attorneys of record, the said respondent Alice Barbee Wick, reserving and retaining her special appearance and her right to urge the removal of this cause to the District Court of the United States for the Eastern District of Washington, Northern Division, and her right to question the jurisdiction of this court; and the court having considered the said demurrer and the arguments of counsel, and being fully advised of the law and the premises, it is

Ordered, that the said demurrer be and the same hereby is overruled and denied, to which ruling of the court the said respondent excepts and said exception is allowed.

Done in Open Court this 28 day of Feb. 1927.

W. O. Parr, Judge.

[File endorsement omitted.]

[fol. 58] In Superior Court of Chelan County

[Title omitted]

Order Overruling Motion to Make More Definite and Certain, etc.—Filed Mar. 1, 1927

This cause came regularly on for hearing upon the motion of the above named respondent, Alice Barbee Wick, to

make the petition more definite and certain, etc., as in said motion set forth, the respective parties appearing by their respective attorneys of record, the said respondent, Alice Barbee Wick, reserving and retaining her special appearance and her right to urge the removal of this cause to the District Court of the United States for the Eastern District of Washington, Northern Division, and her right to question the jurisdiction of this court, and the court having considered the said motions and the arguments of counsel, and being fully advised of the law and the premises; it is

Ordered that the said motions be and the same hereby are each for the purpose of hearing on public use & Necessity overruled and denied, to which ruling of the court the said respondent excepts and said exception is allowed. Right reserved to respondent to re-present said motions prior to hearing as to damages.

Done in Open Court this 28 day of February, 1927.

W. O. Parr, Judge.

[File endorsement omitted.]

[fol. 59] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

Consolidated

ORDER ON MOTIONS TO MAKE MORE DEFINITE AND CERTAIN AND FOR BILL OF PARTICULARS

The above actions having come regularly to be heard the 23rd day of March A. D. 1927, in open court upon the several motions to make more definite and certain and for Bills of Particulars in the above actions as consolidated by orders of the court heretofore made and entered,

Petitioner appearing by Post & Russell; Charles S. Albert and Edwin C. Matthias as its attorneys of record;

Respondents in actions Nos. 7389, 7441, 7478, 7651, 7604 and 7603 appearing by Shorts & Denny; O. P. Barrows and

Wm. A. Grimshaw, as their attorneys of record, and in action No. 7602 appearing by C. B. Hughes, as attorney of record;

It being agreed by counsel for the respective parties so appearing that said motions shall be heard at this time, and the court having heard and considered the arguments of counsel for the said respective parties and seen and considered the records and files and being fully advised in the premises,

It is by the court ordered that the motions to make more definite and certain of said severally appearing parties in action Numbers aforesaid, being motions numbered 1, 2, 3, 4, 5, and 6, be and each hereby are severally denied.

To each of which rulings the said appearing respondents severally duly except and their exceptions are hereby noted [fols. 60 & 61] of record.

And it is further ordered that said appearing respondents alternate motions for Bills of Particulars of the matters covered by said motions to make more definite and certain, numbers 1, 2, and 3, thereof, be and hereby are granted, and the petitioner be and hereby is required to furnish each said appearing respondent a bill of particulars setting forth by metes and bounds survey description the portion or portions of real estate referred to in Petitioner's Notice and Petition as to said several respondents, which Petitioner seeks to inundate and overflow by impounding the waters of Lake Chelan and the Chelan River, and raising the same to the maximum elevation of 1,100 feet above mean sea level; but not including lands which may be damaged by wave wash, erosion, seepage, inundation or any similar cause as a result of holding the waters of Lake Chelan up to said maximum elevation of 1,100 feet.

To each of which several rulings the petitioner duly excepts and its exceptions are hereby severally noted of record.

And it is further ordered that said appearing respondents alternative motions for Bills of Particulars of the matters covered by said motions to make more definite and certain, numbers 4, 5, and 6 be and severally are hereby denied.

To each of which rulings the severally appearing respondents duly except and their exceptions are hereby severally noted of record.

Done in open court this 28 day of March, A. D. 1927.

W. O. Parr, Judge.

[fol. 62] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

Consolidated

ORDER OF CONSOLIDATION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF PUBLIC USE AND NECESSITY

The above-entitled causes came on regularly for hearing before the Honorable W. O. Parr, judge of the above entitled court, upon the application of the petitioner for an order adjudicating public use and necessity, the petitioner appearing by its officers and its attorneys, Messrs. Frank T. Post and Edwin C. Matthias, and the respondents appearing as follows: In cause No. 7391 the respondent Alice Barbee Wick by her attorneys, Adrian W. Vollmer, Peters & Powell and Robert H. Evans, the respondent Chelan County, Washington appeared by its prosecuting attorney Mr. J. A. Adams; in cause No. 7389 the respondents Leonard J. Woodruff and Jane Doe Woodruff, his wife, James P. Flick and Grace M. Flick, his wife, appeared by their attorneys Messrs. William A. Grimshaw and O. P. Barrows, and the respondent Chelan County, Washington, appeared by its prosecuting Attorney, Mr. J. A. Adams; In cause No. 7406 the respondent Katheryn V. Cowan and all respondents other than Chelan County, Washington, appeared by their attorneys W. B. Stratton and S. J. Chad-
[fol. 63] wick, the respondent Chelan County, Washington appeared by its prosecuting attorney J. A. Adams; In cause No. 7441 the respondents Schuyler J. Gray and Dora Gray, his wife, appeared in person and by their attorneys, Shorts & Denny, Wm. A. Grimshaw and O. P. Barrows, the respondents James F. Cargill and Jane Doe

Cargill, his wife, appeared not, and the respondent Chelan County, Washington, appeared by its prosecuting attorney, Mr. J. A. Adams; in cause No. 7442 the respondents W. A. Robison, Mamie R. Robison, an incompetent, and W. A. Robision, as guardian of the person and estate of Mamie R. Robison, an incompetent, appeared by their attorney, W. M. Emerson, the respondent Chelan County, Washington, appeared by its Prosecuting Attorney, Mr. J. A. Adams, and the respondent S. W. Sutton and Jane Doe Sutton, his wife, Mary L. Rupe and J. M. Rupe, her husband, Mary A. Edmunds, Clara E. Ridout and Palmer D. Edmunds, appeared not; in cause No. 7478 the respondent Etheldia Burge appeared by her attorneys Shorts & Denny, Wm. A. Grimshaw and O. P. Barrows, and the respondent Chelan County, Washington, appeared by its Prosecuting Attorney, Mr. J. A. Adams; in cause No. 7651 the respondent Richard H. Lord appeared by his attorneys Messrs. Shorts & Denny, Wm. A. Grimshaw and O. P. Barrows, and the respondent Chelan County, Washington, appeared by its prosecuting attorney, Mr. J. A. Adams, the respondent Northwestern and Pacific Hypotheekbank, a corporation, appeared not; In cause No. 7652 respondent Fern Ellingsworth Bennett, Evan McCord Bennett, a minor, and Fern Ellingsworth Bennett, administratrix of the estate of Walter Bennett, deceased, E. S. McCord, McCord Taylor and Jane Doe Taylor, his wife, appeared by their attorneys Peters & Powell and Robert H. Evans, the respondent J. B. Colt Cmpany, a corporation appeared by its attorney Mr. Fred Kemp, the respondent Chelan County, Washington appeared by its Prosecuting Attorney Mr. J. A. Adams, and the respondent Chelan Lumber Company, a corporation appeared not; In cause No. 7479 the respondent, [fol. 64] Chelan County, Washington, appeared by its prosecuting attorney, Mr. J. A. Adams, and the respondents I. E. Pershall and Jane Doe Pershall, his wife, appeared not; in Cause No. 7519 the respondent Edward Pletcher appeared by his attorney, Martin H. Easton, the respondent Chelan County, Washington, appeared by its Prosecuting Attorney, J. A. Adams, and the respondents May L. Rupe and J. M. Rupe, her husband, appeared not; in Cause No. 7450 the respondents Chelan County, Washington, appeared by its Prosecuting Attorney, Mr. J. A.

Adams, and the respondents O. P. Black and Jane Doe Black, husband and wife, appeared not; In Cause No. 7451 the respondent Chelan County, Washington appeared by its Prosecuting Attorney, Mr. J. A. Adams, and the respondents Mart B. Gilchrist and Jane Doe Gilchrist, husband and wife appeared not; In Cause No. 7452 the respondent Chelan County, Washington appeared by its Prosecuting Attorney, Mr. J. A. Adams, and the respondents Kitty Moran and *Jane* Doe Moran, wife and husband, Edmund M. Bartlett, Trustee, Harrietta Bartlett, Samuel Brown, and Jane Doe Brown, husband and wife, appeared not; In cause No. 7604 the respondent Chelan County, Washington, appeared by its Prosecuting Attorney Mr. J. A. Adams, and the respondents Abbie A. Norris, a widow, Sadie A. Mark (also known as Sadie Norris Mark) and L. E. Mark, her husband, and all other respondents appeared not; in Cause No. 7603 the respondents Schuyler J. Gray and Dora Gray, his wife, appeared by their attorneys, Shorts & Denny, Wm. A. Grimshaw and O. P. Barrows, and the respondent Chelan County, Washington, appeared by its prosecuting attorney, Mr. J. A. Adams; and in cause No. 7602 all respondents other than Chelan County, Washington, appeared by their attorneys C. B. Hughes, and the respondent Chelan County, Washington, appeared by its prosecuting Attorney, Mr. J. A. Adams.

Thereupon the respondents, Leonard J. Woodruff and Jane Doe Woodruff, his wife, James P. Flick and Grace M. [fol. 65] Flick, his wife, and Alice Barbee Wick, moved the court for separate hearings upon the question of public use and necessity, which motions were by the court severally denied and the exceptions of the said severally moving respondents thereto duly noted, whereupon the court ordered that, without waiving the special appearances for the proposed hearing and determination of the questions of public use and necessity, and of any appeal or writ of certiorari for the review of the order of this court upon those questions, all of the above numbered cases may be consolidated and treated as one cause, and decided by one order, and that if the question of damages in said causes should hereafter be tried there should be a separate trial and a separate verdict in each of said causes in all respects as though said causes had never been consolidated

for any purpose; And thereupon evidence was introduced by the petitioner in support of the allegations of its petitions and by the respondents in opposition thereto, and the court having duly heard and considered the evidence and the arguments of counsel, and being fully advised in the premises, makes the following:

Findings of Fact

I

That each and all of the respondents in each and all of the above entitled causes were duly served in the manner prescribed by law with the notice and petition in the causes wherein they are respectively the respondents and that this court has jurisdiction of the respondents, of each and all of them, and of the subject matter of these proceedings; that the respective respondents are all the owners, encumbrancers and persons or parties interested in the property described in the petitions in the respective causes wherein they are respondents.

II

That the petitioner Chelan Electric Company, is a public service corporation organized and existing under the laws [fol. 66] of the State of Washington, that it has complied with the laws of the said State of Washington relating to such corporations, and has paid its annual license fee last due the State of Washington and its license fees for all previous years, and that all of its corporate stock has been subscribed for and fully paid.

III

That the object and purposes for which the petitioner was and is incorporated are:

"To develop, adopt, and utilize for railroad, lighting and general power purposes, the water power afforded by the Chelan Lake and the Chelan River; to construct, operate and maintain a plant or plants for the electric transmission of power, light and heat to the Town of Chelan, and to all other cities, towns and places economically accessible from

such source or sources of power, to erect, own and operate a plant or plants for furnishing light, heat and power in all such cities, towns and places, and to furnish light, heat and power therein for any purposes to individuals, public or private corporations and municipal bodies; to engage in supplying the Town of Chelan with light, heat and water for general, municipal and domestic uses; to purchase, erect, own and operate water works in connection therewith; to erect and maintain dams, reservoirs, mills, manufactories and to operate the same; to furnish light, heat and water for general, municipal and domestic purposes in any and all towns within economical reach of the source of power on the Chelan River; to construct a line of electric railroad from a point on the Great Northern Railroad near Wenatchee, Washington, running through the valley of the Columbia River in a general northerly direction to the said Lake Chelan and thence further north on the Columbia River and following up the Okanogan River to a point at or near the northern end of the State of Washington; of doing a general railroad business, carrying passengers and freight for hire; of exercising the right of eminent domain and acquiring the lands or other properties necessary in carrying on the business of the Company; of doing a general express business; of borrowing money, issuing bonds or other obligations and securing the payment thereof by mortgage, or other lien upon all or any portion of the property of the Company; of buying, owning, holding and voting stock in other corporations; of dealing in bonds, stock and other obligations of other corporations; of carying on a general merchandise business; of buying, owning and dealing in land and real estate; of entering into agreements with other transportation lines, whether rail or water, for the transmission and carrying of freight in connection with the lines operated by this corporation; of guaranteeing the indebtedness of, or otherwise subsiding, other transportation lines, which may be deemed to be of advantage in the business of this Company; of subsidizing or otherwise encouraging the location of mills, of all classes, kinds and character, within the boundary reached by the power lines or railroads of this Company; of laying out town sites, platting lands and improving the same for the purpose of

causing the location of inhabitants thereon; of acquiring lands in irrigating schemes and completing all necessary ditches, flumes or other means of conveying water for irrigating; of owning wharves, docks, and piers and doing a general wharfinger business thereon; of assuming and receiving all the benefits of Chapter 159 of the laws of 1907, [fol. 67] being that certain act entitled 'An Act relating to the exercise of the power of eminent domain by corporations generating and transmitting electricity and using and selling the same for light and power,' which said act was approved by the Governor on March 13, 1907, and for the purpose of availing itself of the said Act the said Chelan Electric Company does hereby assume the additional right to sell electric power and electric light to private customers outside the limits of a municipality and to sell electric power to private consumers within the limits of a municipality and does hereby assume and undertake with the State of Washington and the inhabitants thereof that with respect to the duties and purposes aforesaid, it will and does hereby ssume and undertake the duties and purposes aforesaid, it will and does hereby assume and undertake the duties and obligations of a public service corporation and the said Chelan Electric Company does hereby assume all the duties and obligations required of companies availing themselves of the Act of the Legislature hereinbefore referred to and agrees that it will conform to and comply with all the requirements and obligations of the said Act; and in general of doing any and all things which the Trustees of the Company may deem necessary or advisable in carrying on the business of the corporation."

IV

That the petitioner has a permit from the Supervisor of Hydraulics of the State of Washington to appropriate all waters of the Chelan River and Lake Chelan, subject to existing rights and to a reservation of not to exceed 33,000 acre-feet each year for irrigation and domestic uses on lands bordering and near the Lake, said 33,000 acre-feet, or such part of it which may be required for beneficial use on said lands to be so used only under permits issued by the State Supervision of Hydraulics, and unless and until all of said 33,000 acre-feet is covered by valid appropria-

tion, any unappropriated balance thereof is also avail- for use of the petitioner under the above mentioned permit from the State Supervisor of Hydraulics. That the petitioner also has a permit from the Supervisor of Hydraulics of the State of Washington to construct a reservoir and to store for beneficial use in Lake Chelan and the Chelan River the waters so covered by its appropriation permit first mentioned. That under and by virtue of said permits the petitioner is entitled to use the said waters of Lake Chelan and the Chelan River in the development of electric power and energy for municipal lighting, railway, operation, irrigation pumping and other uses permitted by law. That the petitioner is a public service corporation as the same is [fol. 68] defined in Chapter 117 of the Laws of 1911 of the State of Washington and acts amendatory thereto; that it has heretofore filed with the Public Service Commission, or its successors, the Department of Public Works its schedule of rates for electricity furnished to the public; that it has heretofore and does not recognize the right, power and authority of the Department of Public Works to regulate all its rates and service for and in the furnishing of electric energy to all its customers and the public generally, as provided in that statute.

V

That Lake Chelan is one of the navigable waters of the United States, and that the petitioner has a license from the Federal Power Commission under and by virtue of the Act of Congress approved June 10, 1920 (41 Stat. 1063), known as "The Federal Water Power Act," for the construction, operation and maintenance of the dams, water conduits, reservoirs, power houses, transmission lines and other project works necessary or convenient for the development, transmission and utilization of the water power afforded by the waters of said Lake Chelan and the Chelan River and by raising and storing such waters to the maximum elevation of 1,100 feet above mean sea level. That in and by said Federal Power Commission License it is provided, inter alia, as follows, to-wit:

"The Licensee shall abide by such reasonable regulation of the services to be rendered to customers or con-

sumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the state in which the service is rendered or the rate charged; and in case of the service by the Licensee or by its customers engaged in public service within a state which has not authorized and empowered a commission or other agency or agencies within said state to regulate and control the services to be rendered by the Licensee or by its customers engaged in public service or the rates and charges of payment therefor, or the amount of character of securities to be issued by any of said parties, it is agreed as a condition of this license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the state shall have provided a commission or other authority for such regulation and control. The commission hereby declares it to be its purpose to exercise the jurisdiction over any securities hereafter issued or assumed by the Licensee to the extent authorized under the provisions of section 19 and/or 20 of the Act; and the Licensee shall not hereafter sell, pledge, repledge or otherwise dispose of any of its [fol. 69] own securities or assume any obligation or liability as guarantor, endorser, surety, or otherwise, in respect of the securities of any other person, natural of artificial, unless and until authorized by the Commission so to do; Provided, that the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this article as soon as the state shall have provided a commission or other authority for the regulation and control of that specific matter."

That the petitioner has accepted all of the terms and conditions of the said Federal Water Power Act of June 10th, 1920, and the further conditions imposed in the said Federal Power Commission License.

VI

That the Washington Water Power Company is a public service corporation organized and existing under the laws of the State of Washington, having been so organized in the year 1889; that it has complied with the laws of the State

of Washington relating to such corporations and has paid its annual license fee last due the state of Washington and its license fees for all previous years, and that all of its original corporate stock was subscribed for and fully paid and several increases of its capital to the aggregate amount of more than $20,000,000 have been fully paid; that it is the owner of all the capital stock of the Chelan Electric Company except the qualifying shares for the five members of the Board of Trustees, each holding and owning one share. That the Washington Water Power Company has its principal place of business in the City of Spokane; that for several years it has been regulated as to rates and service by the Department of Public Works of the State of Washington and has recognized and does now recognize the right, power and authority of the State of Washington through said Department of Public Works to reasonably regulate it as to rates of service, as provided by and in the statute passed by the Legislature of the State of Washington on March 18th 1911, known as Chapter 117 of the Laws of 1911, and all acts amendatory thereof. Said corporation was incorporated for the following purposes:

"To buy, own, sell, lease, improve and deal in real estate, water power, water power privileges, sites and franchises, mill and manufacturing sites and privileges, to erect, con- [fol. 70] struct, own, operate and maintain mills and manufactories, canals, aqueducts, flumes, dams, warehouses, offices, bridges, railroads, street railways, tramways, piers and structures, as may from time to time be deemed necessary for the best interest of the corporation, upon its own premises, or upon the premises leased or otherwise acquired by it, and to do all other things pertaining to and for the benefit of the property, to do and transact a general milling and manufacturing business; to lease, mortgage, sell and convey the whole or any part of its property, to borrow money on bonds, notes, bills of acceptance, or otherwise, of the corporation, upon such terms and for such time and upon such rate of interest as the Board of Trustees may determine, and to secure the payment of the same by mortgage upon the whole or any part of its property, real, personal or mixed, or by such other means as its Board of Trustees may deem expedient; to loan its own money, or dispose of, sell or convey its property upon such terms and

for such rate of interest as the Board of Trustees may deem expedient, and to receive therefor such notes, mortgages or other evidences of indebtedness as the Board of Trustees may determine; to buy, sell, hypothecate, hold, manage, vote and deal in the stock and bonds, notes and securities of other corporations having capital stock, for whatsoever business the same may be organized, and to that end in good faith, if desired, to acquire its own stocks and exchange the same for stocks, bonds, notes, and securities of such other corporations; to acquire, own, sell, lease, equip, maintain, operate, transmit, furnish, deliver, deal in electricity, electric power, electric light plants, and all kinds of electrical machinery and apparatus, and to erect, construct equip, maintain and operate poles, wires, and all other matters and things necessary or proper to fully enjoy each and all of said powers and privileges; to buy, own, lease, improve, deal in, maintain and conduct parks, natatoriums, places of amusement and all matters and things incident thereto or properly connected therewith; to buy, sell, mortgage, erect, construct, maintain and operate telephone lines, poles, wires, cross arms, and all matters and things incident thereto or proper or necessary therefor; to acquire, hold, buy, deal in, use, improve, maintain, develop, operate, sell, mortgage, lease, convey, encumber, hypothecate and dispose of water, water rights, dams, reservoirs, canals, conduits, ditches, flumes, pipe lines, lands, easements, right of way and buildings; and appropriate and divert water as and in the manner provided by law for any and all legal purposes in the States of Washington, and Idaho; to furnish, deliver, supply, lease, and sell water for any and all lawful uses and purposes; to convey, flow, supply, deliver and furnish water by and through conduits, canals, streams, ponds, reservoirs, ditches, flumes, canals, conduits and pipes, and to, upon and over any and all other places and premises that it may be lawful so to do, and to do any and all matters and things which may lawfully be done in order that said company may fully enjoy all the powers and privileges hereinbefore enumerated."

That it is under contract to furnish and does furnish, and has for many years furnished, to public service corporations in the State of Washington electric energy, by means

of which such corporations operate certain lines of railroad and electric railways in the City of Spokane and in various counties in Eastern Washington, and said public service corporations depend upon the said Washington Water Power Company for the same and it is legally liable to furnish such electric energy for said purposes. That it is also [fol. 71] under contract to furnish, has for many years furnished, and does now furnish numerous municipalities in Eastern Washington and the inhabitants thereof with electric energy for the purpose of lighting said municipalities and the streets and avenues thereof, the houses and homes therein, and for other public uses. That it has recently entered into a contract with the Great Northern Railway Company whereby it is obligated to furnish all of the electric energy that said railroad may require when and if it shall electrify its system east of Wenatchee or Appelyard, Washington, and as far east as Troy, Montana. The Washington Water Power Company is the owner of five hydro-electric power plants situate in the State of Washington upon the Spokane River, and through a subsidiary corporation is the owner of a hydro-electric power plant situate upon the Similkameen River in Okanogan County, Washington, and is also the owner of a hydro-electric power plant situate at Post Falls in the State of Idaho. That in the years 1925 and 1926 the power produced by said seven hydro-electric plants of the Washington Water Power Company has been insufficient to supply the needs of its customers, and it has been and is now obliged to purchase power from other companies in order to avoid a shortage. That by reason of the demands upon said company for electric energy to be furnished for the aforesaid purposes and of the increasing demands therefor and in order to accommodate the public using and depending upon the same, it has become and is necessary to construct, equip, build and operate another hydro-electric power plant for those purposes, and because thereof and before the commencement of those actions it purchased and acquired the capital stock of the Chelan Electric Company and has furnished and is furnishing to it the moneys required by it to construct an hydro-electric power plant on the Chelan River, which development requires the use of Chelan Lake as a reservoir in the manner authorized by the above mentioned reservoir

and appropriation permit from the state of Washington and the above mentioned license from the Federal Power Commission. The electric energy to be generated in said [fol. 72] new plant will be delivered to the Washington Water Power Company at the switchboard of said new plant for transmission by the Washington Water Power Company to its customers in the State of Washington.

VII

For twenty years or more the Washington Water Power Company has been transmitting and selling electric energy in Northern Idaho. About twenty years ago it constructed a power plant and controlling works at Post Falls, Idaho, on the Spokane River. Since that time it has been using Lake Cœur d' Alene in Idaho as a reservoir for the storage of flood waters of the springtime to be used during the low water season in the summer and fall for the generation of electric energy. For flowage easements over lands around the Lake and bordering on rivers flowing into the Lake it has paid approximately $700,000. The season of ordinary low water in the Spokane River begins about July first and ends about December first in each year, but some years it extends to a later period. In the year 1926, during the five months' period from July first to December first, the Washington Water Power Company sold in Idaho 54,800,000 kilowatt hours, and generated at its Post Falls plant 17,600,000 kilowatt hours, and there was generated in its hydro-electric plants on the Spokane River in the State of Washington as a result of said storage in Lake Cœur d' Alene 52,080,000 kilowatt hours, which could not have been generated if it had not acquired such storage.

The Washington Water Power Company contemplates selling the electric energy necessary for the operation of a zinc plant in Northern Idaho, which plant will be used in the reduction of zinc ores there mined. Said plant has not been constructed and no formal contract has as yet been entered into. Said zinc plant, if and when constructed, would consume during said five months' period approximately 33,000,000 kilowatt hours, or 80,000,000 kilowatt hours during a calendar year. During the twelve months' period in the year 1925 the number of kilowatt hours sold [fol. 73] by the Washington Water Power Company and

consumed in Idaho was approximately 114,000,000 and during the twelve months' period in the year 1926 the number of kilowatt hours sold by the Washington Water Power Company and consumed in Idaho was approximately 128,600,000. During the twelve months' period in 1925 approximately 48,650,000 kilowatt hours were generated at the Post Falls plant, and 51,000,000 kilowatt hours were generated in the hydro-electric plants on the Spokane River in the State of Washington, which could not have been so generated if the company had not had such storage in Lake Cœur d' Alene. The Post Falls plant is capable of producing a larger number of kilowatt hours than that stated above, but these plants are not run to capacity during the high water season because the limit of sale of electric energy is controlled by what can be produced during the low water period.

The Company has constructed and in operation high voltage transmission lines by which all of its power plants are connected, the same being shown upon a map in evidence, Exhibit 28-A. None of the power used or to be used in the State of Idaho will flow into the State of Idaho from the Chelan plant. Such power as may be used in the State of Idaho in excess of that produced at the Post Falls plant will flow into the State of Idaho from the plants situate upon the Spokane River, if and when there is an increase in the electric energy used in the State of Idaho, such increase will tend to decrease the use in the State of Washington of the electric energy generated in the power plants upon the Spokane River in the State of Washington, and tend to cause the flow of the energy produced at the Chelan plant farther east in the state of Washington than it would flow if there were no increase in the use of electric energy in the State of Idaho.

[fol. 74] VIII

That in order to develop and apply to the uses above mentioned the waters of Lake Chelan and the Chelan River, as authorized by the above mentioned appropriation and reservoir permits from the state of Washington and the above mentioned license from the Federal Power Commission, and to meet the present and future demands and requirements of the public and the customers of the Wash-

ington Water Power Company in the State of Washington for electric energy, it is necessary for the petitioner to construct, maintain and operate a dam and reservoir for the storage of said waters to the maximum elevation of 1100 feet, still water measurement, above mean sea level, and for said purposes it is necessary that the petitioner acquire the perpetual right to impound the waters of Lake Chelan and the Chelan River and to raise the same to the maximum elevation of 1100 feet, still water measurement, above mean sea level and to accordingly inundate and overflow the several parcels of real estate described in the several petitions in these consolidated causes and herein described. That in causes No. 7450 O. P. Black, et al., respondents, No. 7451, Mart B. Gilchrist, et al., respondents, No. 7452, Kitty Moran, et al., respondents, it is necessary that the petitioner acquire the fee title to the several parcels of real estate described in the several petitions in said three causes and herein described for the construction, maintenance and operation of tunnels, dams and reservoirs, power houses, water conduits, power, telephone, telegraph, transmission and cable lines, and other projects necessary or convenient for the development, transmission and utilization of the water power afforded by the waters of Chelan Lake and the Chelan River and by raising and storing such waters to the maximum elevation of 1100 feet, still water measurement, above mean sea level, and for rights of way for the same and for the location, construcion and mainenance of buildings, [fol. 75] sheds and other structures, and for the location, maintenance and storage of equipment and supplies of all kinds in connection with said project. That said lands, real estate, premises and property sought to be appropriated and injuriously affected are required and necessary for the purpose of such enterprise of the petitioner.

IX

That the object for which these proceedings are brought is to ascertain and determine the compensation to make in money, irrespective of any benefit from any improvement proposed by the petitioner, to the owner or owners respectively, and to all tenants, encumbrancers and others interested, for the taking or injuriously affecting the lands, real estate and other permises described in the petition,

in the manner above set forth, and for a release from all liability for all damages to the lands described in the petitions, in any manner arising from the impounding and storing of the waters of Lake Chelan and the Chelan River and raising the same to the said elevation of 1100 feet, still water measurement, above mean sea level and in the three causes specifically mentioned in the last preceding paragraph for all damages to the lands described in the petitions in the said three causes, in any manner arising from the construction, maintenance, and operation of tunnels, dams, and reservoirs for the storage of said waters to the maximum elevation of 1100 feet, still water measurement, above mean sea level, from the construction, maintenance and operation of power houses, water conduits, power, telephone, telegraph, transmission and cable lines, and other projects necessary or convenient for the development, transmission and utilization of the water power afforded by the waters of said Lake Chelan and the Chelan River and by raising and storing such waters to the maximum elevation of 1100 feet, still water measurement, above mean sea level, and from the location, construction and maintenance of buildings, sheds, and other structures and the storage of equipment and supplies of all kinds in connection with said project. That the petitioner has already acquired [fol. 76] through purchase the major portion of the property necessary for the said power development.

X

That the entire output of electric energy distributed and sold, and to be distributed and sold by the Washington Water Power Company, including the power to be produced by the proposed hydro-electric plant on the Chelan River, is, and will be devoted to a public use, and the object for which the lands, real estate, premises and property of the respondents are sought to be appropriated is, and will be a public object and use, and the public interest requires and will require the prosecution of the enterprise of the petitioner.

XI

That the plan of the petitioner for the development of the Chelan power is to construct a dam that will hold the waters

of Lake Chelan and the Chelan River at a maximum elevation of 1100 feet, still water measurement, above mean sea level, and to install the power generators in units. That in order to provide for the prospective needs of all the customers of the Washington Water Power Company in the State of Washington it is necessary that the first unit of the proposed plant be constructed and put in operation not later than the month of June, 1927, the second unit not later than the month of June, 1929, and the third and fourth units not later than the month of June, 1931. That in the prudent management of such a business it is wise to provide a producing capacity approximately fifteen per cent above the estimated needs of the customers of the business to insure service during periods of unforseen demand and unusual weather conditions, and that the findings above made do not include this margin of prudence.

XII

That the Washington Water Power Company intends to, and will conduct its electric light and power business in the future as in the past.

[fol. 77]

XIII

That in order to acquire title to the property described in the respective petitions it is necessary for said petitioner to condemn said property and to acquire the same for the purposes aforesaid by appropriate proceedings under and by virtue of the power of eminent domain conferred upon said petitioner in common with other like corporations in and by the laws of the State of Washington.

* * * * * * *

That on the 13th day of September, 1909, the Chelan Electric Company filed its petition with the Board of State Land Commissioners of the State of Washington, by which petition it sought the right to inundate and overflow to the high water of Lake Chelan estimated to be at the elevation of 1,085 feet, above sea level, all lands owned by the State of Washington along the shores of said Lake, which would in any way be affected by raising the waters of said Lake

to the estimated high water mark, said petition being filed in pursuance of Chapter 125 of the Session Laws of 1907; that the Board of State Land Commissioners sent a Surveyor to Lake Chelan, who investigated the plans and purposes of the Chelan Electric Company, and thereafter the said Board held a public hearing in the town of Chelan, a notice of such hearing being first duly published in a paper in the City of Wenatchee and in the town of Chelan. The Board also personally inspected the entire Lake shore at Lake Chelan, and after said hearing, at which a large number of residents of the Lake shore of said Lake were present and gave testimony, and after considering the facts brought before the Board by the petitioner and the facts learned as a result of the Board's survey, and from the Board's personal inspection of the Lake and the shores of the Lake, an order was entered by said Board, dated December 6, 1909, assessing the amount of damage to the lands belonging to the State of Washington, caused or to be caused by the Chelan Electric Company, or its successors or assigns, by perpetually backing and holding the waters of the said Lake Chelan upon and over the said lands [fol. 78] belonging to the State and overflowing and inundating the same to the high water mark estimated to be at the elevation of 1,085 feet, at the sum of fourteen thousand five hundred dollars ($14,500.00), and on the 18th day of December, 1909, the said Chelan Electric Company paid to the State of Washington, in accordance and in compliance with said order, the sum of fourteen thousand five hundred dollars ($14,500). A certified copy of said petition of the Chelan Electric Company and the order entered thereon and of the receipt acknowledging payment to the State of Washington of the said sum of fourteen thousand five hundred dollars ($14,500) were filed for record in the office of the Auditor of Chelan County, December 22, 1909, and at all times since said date have been a matter of public record in said office, and a copy of said petition, order and receipt appears as Exhibit 36 in the files of this consolidated cause.

Pursuant to the foregoing Findings of Fact the Court makes the following

Conclusions of Law

That the public interest requires the prosecution of the enterprise of the petitioner, and that the said land, real estate premises and other property sought to be appropriated in the respective causes are required and necessary for the purpose of said enterprise.

[fol. 79] Filed and recorded Sup. Ct. Journal Vol. 13, page 115-120, Mar. 24, 1927. Compared by B. & F. L. T. Armstrong, Clerk, by Fern Collis, Deputy.

It is therefore ordered, adjudged and decreed

I

That the above entitled causes be, and they are hereby consolidated into one cause, to be numbered in the files of this court "Nos. 7391, 7389, 7406, 7441, 7442, 7478, 7651, 7652, 7479, 7450, 7451, 7452, 7604, 7519, 7603 and 7602, Consolidated"; that such consolidation shall be effective for all purposes in connection with the trial and determination of the questions of public use and necessity in said causes, and of any appeal or writ of certiorari for the review of such determination, but that for the purpose of later trial, if any, upon the question of damages, the several causes shall proceed in all respects as though no consolidation had been had for any purpose.

II

That the contemplated use for which the lands, real estate, premises and other property herein and in the petitions in the respective causes described are sought to be appropriated is a public use, and that the public interest requires the prosecution of the aforesaid enterprise, and that the lands, real estate, premises and other property herein and in the petitions in the respective causes described, and sought to be appropriated, and the interest of the said respondents in the respective causes therein, to the extent herein provided, is required and necessary for the purpose of said enterprise, and that said petitioner is entitled to take said lands, real estate, premises and other property

and the interest of the said respondents in the respective causes therein, to the extent herein provided, for its corporate purposes, under and by virtue of the power of eminent domain, upon the payment to the respondents in the respective causes of just compensation to be determined according to law.

[fol. 80] The lands, real estate, premises and other property and the interest in the lands, real estate, premises and other property hereby authorized to be taken are more particularly described as follows, to-wit:

In Cause No. 7391

ALICE BARBEE WICK et al., Respondents

The right in perpetuity, to inundate and overflow to the maximum elevation of 1100 feet, still water measurement, above mean sea level, the following described real estate situate in the County of Chelan, State of Washington, more particularly described as follows, to-wit:

Government Lots One (1), Two (2), three (3) [illegible] Four (4) and the southwest quarter of the southwest quarter of Section three (3); Lots five (5) and six (6), Section four (4); Lot One (1), Section ten (10); Lot forty-two (42), Section Eleven (11) and Lot forty-three (43), all in Township twenty-seven (27) North Range Twenty-one (21) E. W. M., together with all shore lands of the second class situate in front of, adjacent to, or abutting upon that portion of the Government Meander Line lying in front of the above described property, and all littoral and riparian rights thereunto belonging or appertaining, subject to the right of the Chelan Electric Company to perpetually back and hold water upon and over the shore lands situate in front of, adjacent to, or abutting upon that portion of the Government Meander Line lying in front of Lot One (1) Section ten (10) and Lot Four (4) Section three (3), Township twenty-seven (27) North Range Twenty-one (21) E. W. M., and to overflow and inundate the same to the high water mark of Lake Chelan, as granted by the order of the State Board of Land Commissioners, dated December 6th, 1909 (Application No. 7077) under and by virtue of Chapter 125, Session Laws of 1907, together with the right, in

perpetuity, to damage the above described land by wave wash, erosion, seepage, inundation or any similar cause as a result of holding the waters of Lake Chelan up to a maximum elevation of 1100 feet, still water measurement, above mean sea level.

* * * * * * *

It is further ordered that this matter be set down for hearing for the determination of the compensation to be paid to the respondents in the respective causes for the taking of their interest in the property hereinabove described.

Done in open Court this 23rd day of March, 1927

W. O. Parr, Judge.

[fols. 81 & 82] In Superior Court of Chelan County

[Title omitted]

Notice of Setting for Trial—Filed Mar. 26, 1927

To the above-named respondents and to Messrs Adrian Vollmer, Peters & Powell, and Robert H. Evans, your attorneys:

You and each of you will please take notice that the petitioner will call the above entitled cause to the attention of the Honorable W. O. Parr, judge of the above entitled court, for setting for trial at the April Term of the above entitled court on Saturday, the 2nd day of April, 1927.

Dated at Seattle, Washington, this 24th day of March, 1927.

Post & Russell, Charles S. Albert, Edwin C. Matthias, Attorneys for Petitioner.

To the Clerk of the above-entitled court:

Please note the above named cause on your trial calendar for setting for trial on Saturday, April 2nd, 1927.

Post & Russell, Charles S. Albert, Edwin C. Matthias, Attorneys for Petitioner.

Service of the within Note of Issue by receipt of copy acknowledged this 25th day of March, 1927.

Peters & Powell, Attorneys for Respondent Alice Barbee Wick.

[File endorsement omitted.]

[fol. 83] [File endorsement omitted]

SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

Consolidated

EXCEPTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF PUBLIC USE AND NECESSITY—Filed March 29, 1927

Comes now the respondent Alice Barbee Wick, in action No. 7391, specially appearing by Peters & Powell, Robert H. Evans and Adrien W. Vollmer, reserving her right to propose further findings and conclusions as heretofore granted by said court and reserving her right to file further exceptions and excepts to the Findings of Fact and Conclusions of Law and Order of Public Use and Necessity herein entered on the 23rd day of March, 1927, as follows:

I

That said order failed to state that said Alice Barbee Wick appeared specially by her attorneys Peters & Powell, Robert H. Evans and Adrien W. Vollmer.

II

The said respondent excepts to Paragraph 1 of the Findings of Fact.

III

The said respondent excepts to paragraph 2 of Findings of Fact.

[fol. 84]

IV

The said respondent excepts to paragraph 3 of Findings of Fact.

V

The said respondent excepts to paragraph 4 of Fidings of Fact.

VI

The said respondent excepts to paragraph 5 of Findings of Fact.

VII

The said respondent excepts to paragraph 6 of Findings of fact.

VIII

The said respondent excepts to paragraph 7 of Findings of Fact.

IX

The said respondent excepts to paragraph 8 of Findings of fact.

X

The said respondent excepts to paragraph 9 of Findings of Fact.

XI

The said respondent excepts to paragraph 10 of Findings of fact.

XII

The said respondent excepts to paragraph 11 of Findings of Fact.

XIII

The said respondent excepts to paragraph 12 of Findings of Fact.

[fol. 85]

XIV

The said respondent excepts to paragraph 13 of Findings of Fact.

XV

The said respondent excepts to paragraph 14 of Findings of Fact.

XVI

The said respondent excepts to Paragraph 1 of Conclusion of law.

XVII

The said respondent excepts to the order of public use and necessity entered herein, and each and every part thereof.

XVIII

The said respondent excepts to the failure of the court to make and adopt Conclusion of Law No. 1, as proposed by respondent.

XIX

The said respondent excepts to the failure of the court to make and adopt alternative Conclusion of Law No. 1 as proposed by the respondent.

XX

The said respondent excepts to the failure of the court to make and adopt alternative Conclusion of Law No. 2 as proposed by the respondent.

XXI

The said respondent excepts to the failure of the court to make and adopt the following proposal of the respondent to insert in the order and decree of public use and necessity the following:

In the first line thereof after the words "That the contemplated use" insert "only within the State of Washington" and in the thirteenth line thereof, after the words, "for its corporate purposes" insert "for use only within the State of Washington."

Peters & Powell, by A. W. V., Peters & Powell, Robert H. Evans, per A. W. V., Robert H. Evans,
[fol. 86] Adrien W. Vollmer, Adrien W. Vollmer, Attorneys for said Respondent.

[fol. 87] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

EXCEPTIONS TO REFUSAL OF THE COURT TO SIGN PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed March 30, 1927

Comes now the respondent, Alice Barbee Wick, in Cause No. 7391, appears specially by Peters & Powell, Robert H. Evans, and Adrien W. Vollmer, excepts to the court's refusal to sign proposed Findings of Fact and Conclusions of Law in said cause, as follows:

I

Respondent excepts to the court's refusal to sign proposed Finding of Fact No. 1.

II

Respondent excepts to the Court's refusal to sign proposed Finding of Fact No. 2.

III

Respondent excepts to the court's refusal to sign proposed Finding of Fact No. 3.

IV

Respondent excepts to the Court's refusal to sign proposed Finding of Fact No. 4.

[fol. 88]

V

Respondent excepts to the court's refusal to sign proposed Finding of Fact No. 5.

VI

Respondent excepts to the court's refusal to sign proposed Finding of Fact No. 6.

VII

Respondent excepts to the court's refusal to sign proposed Finding of Fact No. 7.

VIII

Respondent excepts to the court's refusal to sign proposed Finding of Fact No. 8.

IX

Respondent excepts to the court's refusal to sign proposed Finding of Fact No. 9.

X

Respondent excepts to the court's refusal to sign proposed Finding of Fact No. 10.

XI

Respondent excepts to the court's refusal to sign proposed Finding of Fact No. 11.

XII

Respondent excepts to the court's refusal to sign proposed Finding of Fact No. 12.

XIII

Respondent excepts to the court's refusal to sign proposed Finding of Fact No. 13.

XIV

Respondent excepts to the court's refusal to sign proposed Finding of Fact No. 14.

XV

Respondent excepts to the court's refusal to sign proposed Conclusion of Law No. 1.

[fol. 89] XVI

Respondent excepts to the court's refusal to sign proposed Conclusion of Law No. 2.

XVII

Respondent excepts to the court's refusal to sign proposed Concluson of Law No. 3.

XVIII

Respondent excepts to the court's refusal to sign proposed Conclusion of Law No. 4.

XIX

Respondent excepts to the court's refusal to sign proposed Conclusion of Law No. 5.

XX

Respondent excepts to the court's refusal to sign proposed Conclusion of Law No. 6.

XXI

Respondent excepts to the court's refusal to sign proposed Conclusion of Law No. 7.

XXII

Respondent excepts to the court's refusal to sign proposed Conclusion of Law No. 8.

Peters & Powell, per A. W. V. Peters & Powell.
Robert H. Evans, per A. W. V. Robert H. Evans.
Adrien W. Vollmer, Adrien W. Vollmer.

[fol. 90] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

Consolidated

RESPONDENT'S PROPOSED FINDINGS OF FACT—Filed March 30, 1927

Comes now the respondent, Alice Barbee Wick, in cause No. 7391, appearing specially by her attorneys Peters & Powell, Robert H. Evans and Adrien W. Vollmer, pursuant to permission heretofore granted by the above entitled court files further and supplemental Findings of Fact and Conclusions of Law:

I

That the said respondent, Alice Barbee Wick is alleged by petitioner to have been served by publication and that said service was inadequate and insufficient, and not in the manner prescribed by law and that the court had no jurisdiction of the said respondent, Alice Barbee Wick, and of the subject matter of this suit.

II

That the Chelan Electric Company is not a public service corporation.

[fol. 91]

III

That the object and purposes for which the petitioner in said cause was incorporated was not for public service.

IV

That under and by virtue of the permits recited in the petitioner's petition, the said petitioner has no right to use the waters of Lake Chelan and the Chelan River for the purpose of overflowing and inundating the lands of the respondents, Alice Barbee Wick, as described in said petition for the purposes mentioned in said petition, and that petitioner is not a public service corporation.

V

That part of the lands in the above entitled cause against Alice Barbee Wick, proposed to be overflowed and inundated by the petitioner is a public road or highway much used for motor and other traffic not mentioned or described in said petition and that said petitioner has no right to overflow and inundate the same.

VI

That the petitioner proposes to raise the waters of Lake Chelan to a still water elevation of 1,100 feet above mean sea level and that in doing si it will necessarily damage, overflow and inundate the respondent's lands above the said 1,100 foot level by action of the waves, sudden freshets and other causes, and that in so doing it will violate the license from the Federal Power Commission recited by the petitioner under which the petitioner alleges it has a permit to raise the waters of Lake Chelan "to the maximum elevation of 1,100 feet mean sea level."

That said permit permits the raising of the Lake for the generation of power for use only within the State of Washington as will appear by reference to the terms of said permit.

VII

That the Washington Water Power Company is not a [fol. 92] party of record to the above recited cause but that the Chelan Electric Company, the petitioner proposes to sell all of its power to said Washington Water Power Company to be used by said Company in the State of Washington and elsewhere in the United States and in the prov-

ince of British Columbia and elsewhere in the Dominion of Canada, and that said Washington Water Power Company is under contract to furnish said power for interstate and intrastate purposes and commerce.

VIII

That when the power from the Chelan Project is commingled with power generated from other projects both within and without the State of Washington it is impossible to segregate it or identify it.

IX

That the chief purpose of the Chelan Project is to convert said Lake Chelan into a storage reservoir to take care of a shortage of power outside the State of Washington in low water season and that the amount of power generated by any plant when calculated merely in kilowatt hours produced, is no indication of its proportionate capacity to supply current during low water season.

X

That it is not necessary for petitioner to convert Lake Chelan into a storage reservoir for the purpose of supplying any shortage in the State of Washington, as there are innumerable power sites on the Columbia River and elsewhere in the said State, available for said purpose, the development of which would improve navigation without marring one of the greatest scenic and thus economic assets of the State of Washington.

XI

That the entire output of petitioner will not be devoted to public use, but will be sold to one customer, the Washington Water Power Company, and by it to be used for public [fol. 93] and private purposes.

XII

That sufficient power can be generated to supply the requirements of the petitioner without raising the waters of

Lake Chelan above high water level of about 1,085 feet above mean sea level.

XIII

That the court has no method of knowing that the Washington Water Power Company intends to, and will, conduct its electric light and power business in the future as in the past.

XIV

That the respondent, Alice Barbee Wick owns all of the shore land described in the petitioner's petition and that all of said shore land, excepting as stated in petitioner's petition, was acquired prior to petitioner's alleged right to overflow and inundate certain of the shore lands on Lake Chelan up to the ordinary high water mark of 1,085 feet above mean sea level.

Presented and refused this 3/30/27.

W. O. Parr, Judge.

[fols. 94-250] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

NOTICE OF SETTING FOR TRIAL—Filed April 15, 1927

To the above-named Respondents and to Messrs. Adrien Vollmer, Peters & Powell, and Robert H. Evans, your attorneys:

You and each of you will please take notice that the petitioner will call the above entitled cause to the attention of the Honorable W. O. Parr, judge of the above entitled court, for setting for trial at the April term of the above entitled court on Saturday, the 30th day of April, 1927.

Dated at Seattle, Washington, this 12th day of April, 1927.

Post & Russell, Charles S. Albert, Edwin C. Matthias, Attorneys for Petitioner.

To the Clerk of the above entitled court:

Please note the above named cause on your trial calendar for setting for trial on Saturday, April 30th, 1927.

Post & Russell, Charles S. Albert, Edwin C. Matthias.

Service of within note of issue by receipt of copy acknowledged this — day of April, 1927.

—— ——, Attorneys for Respondent Alice Barbee Wick.

[fol. 251] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

No. 7391

CHELAN ELECTRIC COMPANY, a Corporation, Petitioner,

v.

ALICE BARBEE WICK et al., Respondents

BILL OF PARTICULARS—Filed April 27, 1927

Comes now the petitioner in the above entitled cause, in compliance with the order of the court heretofore entered herein and furnishes the following metes and bounds survey description of the portion or portions of real estate referred to in the notice and petition herein, and more particularly set forth in the order of public use and necessity heretofore entered herein, which petitioner seeks the right, in perpetuity, to inundate and overflow by impounding the waters of Lake Chelan and the Chelan River, and raising the same to the maximum elevation of 1,100 feet, still water measurement, above the sea level; said lands being situated in the County of Chelan, State of Washington, and the said metes and bounds survey description being as follows, to-wit:

All that part of Government Lot 43, Section 12, Township 27 North Range 21 E. W. M., together with all shore lands of the second class, situated in front of, adjacent to or abutting upon that portion of the government meander line lying in front of the above described property more particularly described as follows, to-wit: Beginning at a point in the west boundary of section 12 distant 3589.1 feet from the southwest corner thereof thence in a southeasterly direction along a direct line making a southeasterly included angle of 87 degrees and 44 minutes with said boundary a distance of 123.6 feet, thence angle right 35 degrees 22 minutes 229.8 feet, thence angle right 4 degrees 35 minutes 173.6 feet, thence angle right 4 degrees 31 minutes 95.2 feet, thence angle right 12 degrees 45 minutes 246.2 feet, thence angle left 13 degrees 42 minutes 192.4 feet, thence angle right 5 degrees 19 minutes 121.8 feet, thence angle right 15 degrees 25 minutes 228.7 feet, thence angle left 18 degrees 26 minutes 368.1 feet, thence angle left 16 degrees 42 minutes 128.5 feet, thence angle right 7 degrees 43½ minutes 122.1 feet, thence angle left 2 degrees 36 minutes 133.7 feet, thence angle right 4 degrees 10 minutes 91.1 feet, thence angle left 7 degrees 25 minutes 138.4 feet; thence angle right 4 degrees 36 minutes 143.9 feet; thence angle right 7 degrees 8 minutes 202.6 feet, thence angle left 26 degrees 11½ minutes 115.7 feet, thence angle right 25 degrees 35 minutes 105.4 feet, thence angle left 31 degrees 57 minutes 198.6 feet, thence angle right 12 degrees 51 minutes 231.2 [fol. 252] feet, thence angle left 34 degrees 38 minutes 134.2 feet, thence angle right 20 degrees 52 minutes 89.9 feet to a point in the east boundary line of Lot 43, Section 12, distant 874.6 feet from the southeast corner thereof, thence north along said boundary a distance of 168.0 feet more or less to the northerly boundary of the shore lands thence northwesterly along said boundary of shore lands lying in front of Government Lot 43 to an intersection with west boundary of Section 12, (produced) thence south along the west boundary of Section 12 a distance of 125.0 feet more or less to the point of beginning, containing an area of 7.10 acres, more or less, situated in Chelan County, State of Washington.

All that part of Government Lots 42 and 43, Section 11, Township 27 North Range 21 E. W. M., together with all

shore lands of the second class, situated in front of, adjacent to or abutting upon that portion of the Government Meander Line in front of the above described property more particularly described as follows, to-wit: Beginning at a point in the east boundary line of Section 11, Township 27 North, Range 21 E. W. M., distant 3589.1 feet from the southeast corner thereof, thence northwesterly along a direct line making a northwesterly included angle of 87 degrees and 44 minutes with said boundary a distance of 20.0 feet, thence angle right 20 degrees 15 minutes 96.5 feet, thence angle left 19 degrees 17 minutes 132.5 feet, thence angle left 31 degrees 12 minutes 204.8 feet, thence angle right 19 degrees 58 minutes 305.5 feet, thence angle right 24 degrees 1 minute 341.6 feet; thence angle left 12 degrees 9 minutes 257.5 feet, thence angle left 4 degrees 20 minutes 580.0 feet, thence angle right 7 degrees 6 minutes 170.0 feet, thence angle left 24 degrees 5 minutes 250.0 feet, thence angle right 11 degrees 21 minutes 182.0 feet, thence angle left 27 degrees 22 minutes 143.0 feet, thence angle right 23 degrees 38 minutes 300.0 feet, thence angle right 17 degrees 44 minutes 133.0 feet, thence angle right 13 degrees 55 minutes 222.0 feet, thence angle left 18 degrees 55 minutes 97.0 feet, thence angle left 14 degrees 40 minutes 103.0 feet, thence angle right 22 degrees 28 minutes 240.0 feet, thence angle right 27 degrees 53 minutes 395.0 feet, thence angle left 20 degrees 40 minutes 78.0 feet, thence angle left 26 degrees 10 minutes 119.0 feet; thence angle right 17 degrees 35 minutes 89.0 feet, thence angle right 24 degrees 20 minutes 287.0 feet, thence angle left 15 degrees 46 minutes 165.0 feet, thence angle right 30 degrees 12 minutes 241.2 feet, thence angle left 14 degrees 54 minutes 173.0 feet thence angle right 15 degrees 33 minutes 115.0 feet, thence angle left 11 degrees 49 minutes 194.0 feet, thence angle right 16 degrees 7 minutes 160.0 feet to a point in the west boundary line of Section 11, distant 4525.0 feet from the southwest corner thereof thence north along said boundary of section 11 a distance of 55.0 feet, more or less to the northerly boundary of the shore lands, thence southeasterly along said boundary of shore lands lying in front of Government Lots 42 and 43 to an intersection with the east boundary (produced) Section 11, thence south along the east boundary of section 11 a distance of 125.0

feet more or less to the point of beginning, containing an area of 7.51 acres, more or less, situated in Chelan County, State of Washington.

All that part of Government Lot 1, Section 10, Township 27 North Range 21 E. W. M., together with all shore lands of the second class situated in front of, adjacent to or abutting upon that portion of the Government Meander line lying in front of the above described property, more particularly described as follows, to-wit: Beginning at a point in the north boundary line of section 10, distant 4732.0 feet from the northwest corner thereof, thence southeasterly along a direct line making a southeasterly included angle of 55 degrees and 30 minutes a distance of 274.6 feet thence [fol. 253] angle left 7 degrees 2 minutes 180.0 feet, thence angle right 18 degrees 14 minutes 98.0 feet, thence angle left 24 degrees 27 minutes 143.9 feet, thence angle left 12 degrees 55 minutes 96.0 feet, thence angle right 22 degrees 0 minutes 190.0 feet to a point in the east boundary line of section 10, thence north along said east boundary of section 10 a distance of 55.0 feet more or less to the northerly boundary of the shore lands, thence northwesterly along the said boundary of the shore lands lying in front of Government Lot 1, to an intersection with the north boundary of section 10, thence west along said boundary of section 10 a distance of 60.0 feet more or less to the point of beginning, containing an area of 0.92 acres more or less, situated in Chelan County, State of Washintgon.

All that part of Government Lot 4, Section 3, Township 27 North Range 21 E. W. M., together with all shore lands of the second class situated in front of, adjacent to or abutting upon that portion of the Government Meander Line lying in front of the above described property, more particularly described as follows, to-wit: Beginning at a point in the south boundary line of Section 3, distant 4732.0 feet from the southeast corner thereof, thence northwesterly along a direct line making a northwesterly included angle of 55 degrees 30 minutes with said boundary a distance of 97.0 feet, thence angle right 5 degrees 36½ minutes 187.0 feet, thence angle right 2 degrees 6 minutes 87.7 feet, thence angle left 57 degrees 0 minutes 67.6 feet, thence angle right 33 degrees 51 minutes 171.2 feet thence angle right 0 degrees 33 minutes 72.0 feet, thence angle left 11

degrees 41 minutes 370.0 feet, to a point in the west boundary line of Lot 4, section 3 distance 653.0 feet from the southwest corner thereof, thence north along said boundary line of Lot 4 a distance of 50.0 feet, more or less to the northerly boundary of the shore lands, thence southeasterly along the said boundary of the shore lands lying in front of Government Lot 4, to an intersection with the south boundary of section 3, thence west along said boundary a distance of 60.0 feet, more or less, to the point of beginning, containing an area of .98 acres, more or less, situated in Chelan County, State of Washington.

All that part of Government lots 1, 2, and 3, of Section 3, Township 27 North, Range 21 E. W. M., together with all shore lands of the second class, situated in front of, adjacent to or abutting upon that portion of the Government meander line lying in front of the above described property, more particularly described as follows, to-wit: Beginning at a point in the west boundary of Section 3, distant 2198.0 feet, north from the southwest corner thereof, thence in a southeasterly direction along a direct line making a southeasterly included angle of 68 degrees and 51 minutes with said boundary a distance of 308.3 feet, thence angle left 13 degrees 17 minutes 103.2 feet, thence angle right 9 degrees 45 minutes 83.3 feet, thence angle right 35 degrees 18 minutes 121.7 feet, thence angle left 29 degrees 45 minutes 136.2 feet, thence angle left 8 degrees 15½ minutes 232.8 feet, thence angle right 17 degrees 53 minutes 185.5 feet, thence angle right 20 degrees 8 minutes 114.5 feet, thence angle left 18 degrees 42 minutes 116.8 feet, thence angle right 13 degrees 26½ minutes 87.3 feet, thence angle left 20 degrees 15½ minutes 192.0 feet, thence angle left 25 degrees 24½ minutes 311.2 feet, thence angle left 11 degrees 50 minutes 416.1 feet, thence angle right 3 degrees 43 minutes 61.4 feet, thence angle right 33 degrees 15 minutes 178 feet, thence angle right 1 degree 29 minutes 218.3 feet, thence angle right 1 degree 29 minutes 191.8 feet, thence angle right 6 degrees 42½ minutes 174.6 feet, thence angle right 29 degrees 20½ minutes 49.4 feet, thence angle [fol. 254] left 28 degrees 44 minutes 88.4 feet, thence angle left 16 degrees 149.3 feet, thence angle right 4 degrees 43½ minutes 53.2 feet; thence angle right 19 degrees 8 minutes 122.4 feet, thence angle left 9 degrees 29 minutes 95.4 feet,

thence angle left 6 degrees 10 minutes 133.0 feet, thence angle left 13 degrees 57 minutes 111.9 feet, thence angle right 19 degrees 24 minutes 91.5 feet, thence angle left 43 degrees 30 minutes 151.8 feet, thence angle right 22 degrees 51 minutes 114.8 feet, thence angle right 16 degrees 36½ minutes 89.3 feet, to a point in the east boundary line of Lot 3 Section 3, distant 653.0 feet from the southeast corner thereof thence north along said boundary a distance of 50.0 feet more or less to the northerly boundary of the shore lands, thence westerly along the northerly boundary of the shore lands lying in front of Government Lots 1, 2, and 3, to an intersection with the east boundary line (produced) of Section 4 Township 27 North Range 21 E. W. M., thence south along said boundary of Section 4 a distance of 117.1 feet more or less to the point of beginning; containing an area of 8.82 acres, more or less, situated in Chelan County, State of Washington.

All that part of Government Lots 5 and 6, Section 14, Township 27 North Range 21 E. W. M., together with all shore lands of the second class situate in front of, adjacent to, or abutting upon that portion of the Government Meander Line lying in front of the above described property, more particularly described as follows, to-wit: Beginning at a point in the east boundary of Section 4, Township 27 North Range 21 E. W. M., distant 2198.0 feet north from the southeast corner thereof thence northwesterly along a direct line making a northwesterly included angle of 68 degrees and 51 minutes a distance of 3.3 feet, thence angle left 5 degrees 23 minutes 208.9 feet, thence angle right 20 degrees 44 minutes 83.3 feet, thence angle right 26 degrees 52 minutes 99.2 feet thence angle right 21 degrees 19 minutes 134.4 feet, thence angle right 9 degrees 36 minutes 231.2 feet, thence angle left 17 degrees 31 minutes 124.7 feet, thence angle right 25 degrees 43 minutes 108.2 feet, thence angle left 25 degrees 50 minutes 129.8 feet, thence angle right 11 degrees 8½ minutes 63.3 feet, thence angle left 11 degrees 50 minutes 69.0 feet, thence angle left 30 degrees 8 minutes 176.0 feet, thence angle left 8 degrees 3 minutes 77.0 feet, thence angle right 19 degrees 50 minutes 133.8 feet, thence angle right 24 degrees 21 minutes 114.9 feet, thence angle left 21. degrees 57 minutes 144.0 feet, thence angle left 5 degrees 51 minutes 96.0 feet, thence

angle right 18 degrees 37 minutes 50.1 feet to a point in the north boundary of Government Lot 5, Section 4, distant 550.2 feet from the northwest corner thereof, thence easterly along said boundary a distance of 355.0 feet more or less to the easterly boundary of the shore lands, thence southerly along the easterly boundary of the shore lands lying in front of Government Lots 5 and 6, to an intersection with the easterly boundary (produced) Section 4, Township 27 North Range 21 E. W. M., thence south along said boundary of Section 4 a distance of 117.1 feet more or less to the point of beginning, containing an area of 5.92 acres, more or less, situated in Chelan County, State of Washington.

Petitioner also seeks the right in perpetuity to damage the above described land, and all lands of the respondents lying contiguous or adjacent thereto, by wave wash, erosion, seepage, inundation, or any similar cause, as a result [fol. 255-264] of holding the waters of Lake Chelan and the Chelan River up to a maximum elevation of 1100 feet, still water measurement, above the sea level, and seeks to secure a release from all liability for all damages to the lands above described, and any and all lands of the respondents lying contiguous or adjacent thereto, in any manner arising from the impounding and storing of the waters of said Lake Chelan and the Chelan River, and raising the same to the maximum elevation of 1100 feet, still water measurement, above the sea level.

Dated this 25th day of April, 1927.

Post & Russell, Charles S. Albert, Edwin C. Mathias,
Attorneys for Petitioner.

Duly sworn to by Edwin C. Matthias. Jurat omitted in printing.

[fols. 265-269] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 20635

Nos. 7389, 7389, 7391, 7441, 7651, 7603, 7602

STATE OF WASHINGTON ON THE RELATION OF LEONARD J. Woodruff et ux., James P. Flick et ux. et al., Alice Barbee Wick et al., Schuyler J. Gray et al., Richard H. Lord et al., Schuyler J. Gray et ux., Edith Merritt et al., Relators,

vs.

THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND for the County of Chelan, the Honorable W. O. Parr, Judge Thereof, and Chelan Electric Company, a corporation, Respondents

MOTION FOR STAY OF PROCEEDINGS—Filed Jun. 14, 1927

Comes now the Relator, Alice Barbee Wick, appearing specially, and respectfully moves the Court for an order modifying the order issued herein on the 29th day of April, 1927, and the writ of certiorari issued on said date in pursuance of said order, and to grant a stay of proceedings and of the trial upon the question of damages in the Superior Court of Chelan County herein until after the decision of this court upon said writ of certiorari.

This motion is based upon the records and files herein and the affidavit of J. L. Baldwin hereto attached.

Adrien W. Vollmer, A. N. Corbin, Paul P. Ashley, J. L. Baldwin, Attorneys for Relator Alice Barbee Wick, 530 Burke Building, Seattle, Washington.

[fol. 270] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 20635

[Title omitted]

AFFIDAVIT OF EDWIN C. MATTHIAS IN RESISTANCE TO MOTION FOR STAY OF PROCEEDINGS—Filed June 17, 1927

STATE OF WASHINGTON,
County of King, ss:

Edwin C. Matthias, being first duly sworn, on oath deposes and says: that he is one of the attorneys for the respondents and makes this affidavit for and on their behalf in resistance to the motion for stay of proceedings herein. That he has read the affidavit of J. L. Baldwin in support of said motion, and denies each and every part thereof, save and except as hereinafter admitted.

On April 29th, 1927, this matter came on for hearing before this court upon the application of the relators for a writ of certiorari herein. The court's calendar on that day was exceedingly long and it looked like the court would not be able to hear the matter. For that reason the Chief Justice requested the attorneys for all of the parties to meet him in his office shortly after one o'clock to discuss what should be done if the cases should not be reached, respondents having impressed upon the Chief Justice the importance of disposing of the question upon that day. Shortly after one o'clock the respective attorneys met with the Chief Justice in his office, the relators being represented by Messrs O. P. Barrows and William A. Grimshaw of Wenatchee, and Adrien W. Vollmer, of Philadel-
[fol. 271] phia, and the respondents by Frank T. Post and affiant. The matter was discussed with the Chief Justice at some length and it was agreed that the respondents would not insist upon arguing the question of the relator's rights to have a writ of certiorari granted and that the writ should issue without a hearing and "that said writ shall not require any stay of proceedings in the Superior Court in any of the causes referred to in said petition for

writ of certiorari", all of said attorneys representing said relators being present and agreeing to said arrangement. Thereupon all of said attorneys prepared the order and writ of certiorari and presented the order to the Chief Justice for signature and the writ of certiorari to the Clerk of the court, and the said order and the said writ were thereupon signed by the Chief Justice. After the order had been signed by the Chief Justice the said Adrien W. Vollmer asked affiant to agree that it might be inserted in the said order granting the said writ that he had merely made a special appearance for the relator Wick, and affiant consented to said correction in long hand, provided it was agreeable to the Chief Justice. The matter was referred to the Chief Justice by the Deputy Clerk and thereupon the correction was made in accordance with the request of the said Vollner.

Setting day in Superior Court of Chelan County was the next day, April 30th, and all of said cases had been noted for setting for trial upon that date, and upon the following day affiant was present in the Superior Court of Chelan County, as were also all of the said attorneys representing the relators. When Judge Parr commenced to set the cases for trial affiant was approached by the said Adrien W. Vollmer, who requested affiant to agree that his case could be tried in the month of June, rather than the month of May. Affiant understanding that the said Adrien W. Vollmer was concerned with the shortness of the time within which to prepare his brief for this court, the case having been set for argument on the second day of June and the court having fixed May 16th as the date upon which his brief must be served, affiant consented that the Wick case could be [fol. 272] set for trial in June upon certain conditions, to which conditions the said Adrien W. Vollmer agreed, but in the written agreement inserted this paragraph:

"This communication is not to be used by you in any way in connection with any litigation in which the said Alice Barbee Wick is a party or at all, and its only force and effect shall be as above stated."

For said reason affiant does not quote from said agreement, although affiant believes the said Adrien W. Vollmer has

violated the spirit of that agreement by stating in his affidavit that he has agreed that the lake may be raised to the elevation of 1085 feet.

All of the cases mentioned in the title herein were tried in the Superior Court of Chelan County on the question of damages during the month of May, except the Wick and Merritt cases, and both of said cases are now set for trial during the month of June, the Wick case for trial on June 22nd. The said cases were set on the regular setting day on May 28th. The motion for stay of proceedings herein was served upon affiant about 5:30 P. M. on the evening of June 13th, so that the statement in the affidavit of said J. L. Baldwin "that an emergency exists and it is not possible to give the usual ten days' notice of this motion" (as required by Rule 19 of this court), "but affiant hastens to serve this affidavit and the motion and notice at the earliest possible date, upon the attorneys for respondents," is not in accordance with the facts.

Judge Parr tried Chelan Electric Company cases during practically all of the month of May, and has set said cases for trial continuously during the month of June, beginning with the 14th instant and has a jury in attendance for said purpose, no other jury cases being set for trial during said month. The trial of these cases involves a large amount of expert testimony, including experts on the question of erosion of the soil due to wave wash, the expense of constructing docks to meet the new conditions upon the lake, the value of the land affected by the enterprise of the petitioner and respondent many and varied other questions which [fol. 273] necessity the attendance of a large number of expert witnesses. All of said witnesses are now present in Wenatchee and have been present during most of the month of May, and the Wick case can be tried more conveniently, more economically and more expeditiously at this time than it can be if continued to a later date. Affiant is informed and believes that the relator Wick, through her nephew and attorney, Adrien W. Vollmer of Philadelphia, has had large corps of attorneys, engineers, surveyors and expert witnesses of all kinds in the field for some time, examining her property and preparing her case for trial.

Edwin C. Natthias.

Subscribed and sworn to before me this 15th day of June, 1927. H. F. Johnson, Notary Public in and for he State of Washington, Residing at Seattle. (Seal.)

Service of the within affidavit, by receipt of a true copy thereof, is hereby admitted this 16th day of June, 1927.

J. L. Baldwin, Attorney for Relator Alice Barbee Wick.

[fol. 274] IN SUPREME COURT OF WASHINGTON

No. 20635

[Title omitted]

ORDER DENYING MOTION FOR STAY OF PROCEEDINGS—June 23, 1927

Ordered that the motion to stay proceedings herein be, and the same is, denied.

[fol. 275] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

No. 7391

CHELAN ELECTRIC COMPANY, a Corporation, Petitioner,

vs.

ALICE BARBEE WICK and CHELAN COUNTY, WASHINGTON, a Municipal Corporation, Respondents

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION—Filed June 27, 1927

Your petitioner, Alice Barbee Wick, one of the respondents above named, and appearing specially for the purpose only of the removal of the above-entitled cause, respectfully shows to this Honorable Court that she is one of the respondents in this suit, which is of a civil nature, and that

the matter now in dispute in this cause exceeds the sum or value of $3,000.00 exclusive of interest and costs.

Your petitioner shows to this Honorable Court that there is in said suit a separable controversy which is wholly between citizens of different states and which can be fully determined as between them, to-wit: a separable controversy between your said petitioner herein, who avers that she was at the time of the bringing of this suit and ever since has been and still is a citizen and resident of the State of Pennsylvania, and not a resident of the State of Washington, and that the said Chelan Electric Company, a corporation organized and existing under the laws of the State of Washington, petitioner in the above entitled proceeding or suit, who as your petitioner herein avers was then and ever since has been and still is a citizen of the State of Washington.

That the said controversy is of the following nature, viz: A proceeding by petition, for the purpose as alleged therein, [fol. 276] "to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by the petitioner to the owner or owners, respectively, and to all tenants, encumbrancers, and others interested for the taking or injuriously affecting the lands, real estate and other premises", in said petition described and hereinafter described, "for a release from all liability for all damages to the lands in any manner arising from the impounding or storing of the waters of Lake Chelan and the Chelan River, and raising the same to the maximum elevation of eleven hundred feet above mean sea level", by building a dam and doing other work necessary for the conversion of said Lake or River into a storage reservoir for the said impounding of said water.

The lands, real estate and other premises proposed to be taken or injuriously effected are situate in Chelan County, State of Washington, and are particularly described in said petition as follows:

Government Lots One (1), two (2), three (3), and four (4), and the Southwest quarter of the Southwest quarter of Section three (3); Lots five (5) and six (6), Section four (4); Lot One (1), Section ten (10); Lot Forty-two (42), Section Eleven (11), and Lot Forty-three (43) all

in Township Twenty-seven (27) North Range Twenty-one (21) E. W. M., together with all shore lands of the second class, situate in front of, adjacent to, or abutting upon that portion of the Government Meander Line lying in front of the above described property, and all littoral and riparian rights thereunto belonging or appertaining.

That it is further claimed in the said petition of the said petitioner, Chelan Electric Company, (and is a part of said controversy) that said appropriation is sought subject to an alleged right on its part to perpetually back and hold water upon and over the shore lands situate in front of, adjacent to, or abutting upon that portion of the Government Meander Line lying in front of said Lot One (1), Section ten (10), and said Lot four (4), Section three [fol. 277] (3), Township Twenty-seven (27) North Range twenty-one (21) E. W. M., and to overflow and inundate the same to the high water mark of Lake Chelan, alleged to have been granted by the order of the State Board of Land Commissioners, dated December 6th, 1909, (application No. 7077) under and by virtue of Chapter 125, Session Laws of 1907.

That the further purpose of said petition as alleged therein is to have the "contemplated use for which the above-described land, real estate and premises are sought to be applied" adjudged and decreed by said Superior Court as a public object and use, and claiming that the public interest requires the prosecution of said enterprise.

That the other respondent in said cause is the said Chelan County, Washington, a municipal corporation and a citizen of the State of Washington; that said Chelan County is not a tenant, lienor, or encumbrancer, and has no right, title interest or estate whatsoever in any of the land, real estate or other premises owned by said Alice Barbee Wick; that there are no taxes or other amounts due and owing by said Alice Barbee Wick to said Chelan County, and that the controversy between said Chelan Electric Company and said Alice Barbee Wick is a separable and distinct controversy between said Chelan Electric Company and said Alice Barbee Wick, your petitioner herein, who are citizens and residents of different states, as aforesaid, which can be wholly determined between said

Chelan Electric Company and said Alice Barbee Wick without the presence in this action of said other respondent, viz: said Chelan County, Washington, a municipal corpora-
[fol. 278] tion. That your petitioner desires to remove said cause to the United States District Court for the Eastern District of Washington, Northern Division, and your petitioner makes and files herewith a bond in the sum of Five Hundred Dollars ($500.00), with good and sufficient surety for her entering said District Court of the United States for the Eastern District of Washington, Northern Division within thirty (30) days from the date of the filing of this petition a certified copy of the record in said cause, and for paying all costs that may be awarded by said District Court if it shall hold that said suit was wrongfully or improperly removed thereto.

Wherefore your petitioner prays that the Honorable Court proceed no further herein except to accept this petition and said bond, as required by law, and to order said cause removed to said District Court of the United States for the Eastern District of Washington, Northern Division, and to order a transcript of the record herein be prepared and certified for transmission to said District Court as provided by law, and to stay all further proceedings herein.

Adrien W. Vollmer, A. N. Corbin, John B. Shorett, J. L. Baldwin, Attorneys for said Petitioner Herein, appearing specially, as aforesaid.

Office and Post Office Address: Widby-Hadley Building, Wenatchee, Chelan County, Washington.

[fol. 279] *Duly sworn to by Adrien W. Vollmer. Jurat omitted in printing.*

[fol. 280] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

BOND ON REMOVAL—Filed June 27, 1927

Know all men by these presents: That we, Alice Barbee Wick, the respondent above, as Principal, and the Globe Indemnity Company, a corporation organized and existing

under and by virtue of the laws of the state of New Jersey, and duly authorized to do business in the State of Washington, as Surety, are held and firmly bound unto the Chelan Electric Company, the petitioner in the above entitled cause, its successors and assigns, in the penal sum of five hundred and no/100 ($500.00) dollars, lawful money of the United States of America for the payment of which sum, well and truly to be made, the said Principal hereby binds herself, her heirs, administrators, executors, and the said Surety Company hereby binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Upon condition, nevertheless, That whereas the said respondent, Alice Barbee Wick simultaneously with the filing of this bond intends to file her petition in the above entitled suit or proceedings in the above entitled court for the removal of such suit or proceedings into the District Court of the United States in the District where such suit or its proceeding is pending, to-wit: The District Court of the United States in and for the Eastern District of Washington, Northern Division, according to the provisions of the Act of Congress in such case made and provided;

Now, if the said Alice Barbee Wick shall within thirty (30) days from the date of filing of said petition for removal enter into the said District Court of the United States in and for the Eastern District of Washington, Northern Division, a certified copy of the record in said suit or proceeding, and shall well and truly pay or cause to be paid, all costs that may be awarded by said District Court of the United States in and for the Eastern District of Washington, Northern Division, if said court shall hold that said suit or proceeding was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, it shall remain in full force and virtue.

Witness our hands and seals this 27th day of June, 1927.

Alice Barbee Wick, by Adrien W. Vollmer, Her Attorney in Fact. (Seal.) Globe Indemnity Company, by Fred M. Crollard, Attorney in Fact. E. Roy Van Leuven. (Seal.)

The foregoing bond is hereby approved and accepted this — day of ——, 1927.

—— ——, Judge.

[fol. 281] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

PROPOSED ORDER OF REMOVAL—Filed June 27, 1927

This cause having come on for hearing and trial in the above named court and the petitioner appearing by its attorneys, Charles S. Albert, and A. J. Clynch and respondent, Alice Barbee Wick, appearing specially by her attorneys, Adrien W. Vollmer, A. N. Corbin, John B. Sherett, and J. L. Baldwin, and petitioner having called witnesses to prove the amount of damages to be awarded to said respondent Wick for the taking and damaging of her property herein and having introduced other evidence and having rested, and said respondent Wick having thereupon presented her petition with special appearance and her bond duly executed in the sum of Five Hundred ($500.00) Dollars, together with an accompanying affidavit petitioning the Court to remove the said cause to the District Court of the United States for the Eastern District of Washington, Northern Division, on the ground that there was no evidence introduced or offered in behalf of said petitioner showing any interest of said Chelan County, in the controversy or proceedings herein or in the property described and on the further ground that whatever controversy there was, if any, was between said Chelan Electric Company and said Chelan County on the one side and said respondent Wick on the other, and that it first conclusively appeared by the close of petitioner's case that said Chelan County had no such interest and was not a necessary or proper party hereto with said respondent Wick; and the matter having been argued by counsel on both sides and the court having fully considered the same and being fully advised in the premises denied said petition and application for removal on the ground that all matters and things now shown to the court as a reason for said removal have been hereto-
[fol. 282] fore shown or might have been shown by said respondent Wick in the hearing upon her former petition for removal heretofore had herein and that no new ground exists or is shown in the present petition, wherefore

It is hereby ordered and adjudged that said petition and application be and the same hereby are denied.

To which ruling and order said respondent Wick excepts and her exception is hereby allowed and noted.

Done in open court this — day of June, 1927.

—— ——, Judge.

The above form of order was drawn at the suggestion of the court by the attorneys for respondent, Alice Barbee Wick, and submitted to counsel for petitioner and to the court at the close of the court session on June 27, 1927, and objected to by petitioner. The Court postponed the matter until 9:30 A. M of June 28, 1927, when the respondent again presented above form, which the court refused to sign, and respondent Wick excepted to said refusal, which exception was allowed and noted; and petitioner presented its proposed form of order which the court signed and to said order and the whole thereof respondent Wick excepted and her exception was and is allowed and entered.

Done in open court this — day of June, 1927.

—— ——, Judge.

[fol. 283] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

ORDER DENYING PETITION FOR REMOVAL—Filed June 28, 1927

This cause came duly on for trial in the above entitled court, on the 23rd day of June, 1927, and said was duly called for trial. Said petitioner by and through its attorneys, announced that it was ready for trial, and said respondent Alice Barbee Wick, by and through her attorneys, Adrien W. Vollmer, A. N. Corbin, John B. Shorrett and L. J. Baldwin, announced that she was ready for trial. Said Chelan County, Washington, a municipal corporation had heretofore appeared in said action by its attorney J. A. Adams. Trial of said action was begun upon said 23rd day of June, 1927, without objection on the part of any of said respondents, or without special appearance having

been made on said date by any or either of the same. A jury was duly impaneled, witnesses were duly called on behalf of said petitioner and cross examined by said respondent Alice Barbee Wick, through her said attorneys. Evidence was introduced, including Exhibits 18 and 19, which were made and are a part of the records and files in this action, and which related to the steps taken toward the vacation of the present county road across the property involved in this proceeding, and the re-establishment of a new county road across said property, and relating to the suit brought by the petitioner herein against Chelan County, Washington, in this court, and the judgment and decree entered therein, all of which more fully appears from said Exhibits on file herein and made a part of the records in this case. Said evidence further showed that the county road referred to in said exhibits 18 and 19 lies within the area included within the boundaries set forth in the Bill of Particulars herein, and sought to be condemned by the [fol. 284] petitioner, and that said road is included in the 31.25 acres shown on Petitioner's Exhibit 2 in this proceeding as land to be affected by the flowage up to the 1,100 foot elevation, still water measurement, above mean sea level, which flowage right is the subject of this proceedings, and that the new county road to be constructed after the judgment and decree of appropriation in this action, is laid out in the immediate vicinity of the present county road, above said 1,100 foot elevation, and over and across lands, the market value of which it is claimed will be depreciated by reason of the flowage of the lands of the respondent, Alice Barbee Wick, up to said 1,100 foot elevation. The petitioner having rested about the hour of 11:30 A. M., said respondent Alice Barbee Wick, served upon petitioner a petition for removal in which petition it was stated that the said Alice Barbee Wick appeared specially for the purpose only of such removal and petitioned the court to remove said cause to the District Court of the United States in and for the Eastern District of Washington, Northern Division, serving therewith the affidavit of Adrien W. Vollmer, and a bond on removal, which said petition, affidavit and bond were immediately handed to the Clerk, marked filed and presented to said court in the courtroom in which the said case was being tried, within two minutes after

being served upon petitioner, and said petition, affidavit and bond were presented without any other notice, written or otherwise, being given to either the said petitioner or said Chelan County, Washington, a municipal corporation, respondent.

Thereupon the court, having heard the argument of counsel for the petitioner objecting to the removal of this cause, and argument of counsel for respondent Wick, at and about the hour of twelve o'clock noon on the 27th day of June, 1927, made an oral ruling denying the petition for removal. Thereafter court adjourned for noon recess and immediately after reconvening court at the hour of 1:30 o'clock in the afternoon, the said respondent, Chelan County, Washington, a municipal corporation, appeared by and through its attorney J. A. Adams, prosecuting attorney for said county, and filed a separate and written objection to the granting of any petition for removal made by [fol. 285] the respondent Wick, which objection is made a part of the files and records in this proceeding. The said petitioner moved to reopen its case and introduce evidence with reference to taxes relating to the property involved in this proceeding, which motion was duly granted and said case reopened, and evidence was introduced herein, which evidence showed, among other things, that on the 12th day of March, 1927, the said respondent, Alice Barbee Wick, by and through Adrien W. Vollmer, her agent and attorney, paid the taxes due for the year 1926 on the property involved in this proceeding, which said taxes had not been paid at the time of the institution of this proceeding and which were then due and unpaid, and which constituted a lien on the property of said Alice Barbee Wick, respondent, and that the said Alice Barbee Wick, by and through her agent and representative, Adrien W. Vollmer one of the attorneys representing her in this case, had then and has ever since said 12th day of March, 1927, had full knowledge and information of the fact that said taxes had been paid for the year 1926, and were no longer a lien upon the property of said Alice Barbee Wick, involved in this proceeding, and that if this cause were removable to the United States District Court it was removable on the 12th day of March, 1927. Said evidence further showed that said property had been duly assessed for the said taxes in 1926 and that

the assessed valuation of said property for 1926 still stands as the assessed valuation of said property for the year 1927.

Now, therefore, it appearing to the court that this is not a separable controversy; that there has been no false or fraudulent joinder of parties hereto; that said petition bond and affidavit on removal have been presented to the court without notice to either said petitioner, Chelan Electric Company, or said respondent, Chelan County, Washington, a municipal corporation; that the said Alice Barbee Wick has had full knowledge and notice of the fact that the said taxes for 1926 have been paid ever since the 12th day of March, 1927; that this cause proceeded to trial without objection on the part of the respondent Wick; that said Chelan County, is a necessary and indispensable party to [fol. 286] these proceedings, that this cause has heretofore been attempted to be removed by the said Alice Barbee Wick to the said United States District Court in and for the Eastern District of Washington, Northern Division, and was on the 3rd day of November, 1926, duly remanded by said United States Court to this court; that neither at the time of the said removal nor at this time was the removal petition noticed, filed or heard within the time limited by law, and that there has been no change in the status of the parties hereto, requiring the granting of the petition for the removal herein.

It is ordered that said petition for removal be and the same is hereby denied. To which respondent Wick excepts which exception is allowed.

Done in open court this 28th day of June, 1927.

W. O. Parr, Judge.

[fol. 287] In Superior Court of Chelan County

[Title omitted]

Respondent's Requested Instructions to Jury—Filed June 30, 1927

Comes now the respondent, Alice Barbee Wick and still preserving her special appearance and objecting to the

jurisdiction of the court both on the ground of defective service of process or notice and on the further ground of loss of jurisdiction by reason of the respondent's petition for removal to the District Court of the United States, requests the court to give the following and each of the following instructions to the jury.

[File endorsement omitted.]

[fol. 288] Instruction No. 1

This is a proceeding instituted under authority of law by which petitioner is enabled to take and appropirate the property of respondent against her will and under such circumstances she is entitled to just and full compensation for all damages by reason of such taking and appropriation, including the full market value of the land and property so taken and appropriated, and all damages which you may find resulting to the portion of her property in the same tract not taken.

Instruction N. 2

You are further instructed that in a proceeding such as this now before you the Petitioner has the burden of proof, and must sustain such burden by a fair preponderance of the evidence.

Instruction No. 3

The market value of property is not determined by the present use or lack of use which may be made of it by the owner; property is not to be deemed worthless because the owner neglects it or allows it to go to waste or is unable or unwilling to put it to any use. Others may be able to use it and make it subserve the necessities and conveniences of life or business. Its value in such a proceeding as this is to be determined with reference to the highest or most valuable use to which it is reasonably adapted.

[fol. 289] Instruction No. 3a

In arriving at the market value are to consider any and every use to which the property is reasonably adapted or

suitable and to fix the highest value which it has for any such use, considering whatever present demand there may be for such use or whatever value it now has in view of the present prospects for demand for such use in the near future.

Instruction No. 4

In fixing the amount of depreciation of the remainder, if you find that the part of the land not taken has a value dependent on the present level and condition of Lake Chelan with reference to the location and construction of docks, bathing boards and like structures and that by reason of the said taking and the maintenance and operation of the proposed project it will cost more to construct, operate and maintain suitable docks, bathing boards and like structures for which said land not taken may reasonably be adapted after said taking, the probable extra cost of construction, operation and maintenance is to be considered by you in fixing the amount of damages to the remainder is to be allowed the respondent, Alice Barbee Wick.

[fol. 290] Instruction No. 5

If you further find that the part of the tract not taken has a value which is partly dependent on the present location and condition of Lake Chelan with reference to pumping water from said Lake for use on said land for any purpose and that by reason of said taking and appropriation and operation and maintenance of the proposed project it will cost more to install, operate and maintain suitable pumps, pipes and so forth, than it would cost under present conditions, you are to consider the extra cost of installing, operating and maintaining such suitable pumps, pipe and so forth, in fixing the amount of damages to the remainder which are to be allowed to said respondent, Alice Barbee Wick.

Instruction No. 6

If you find that the remainder of the tract not taken has a value enhanced by reason of its location with reference

to the present level of the waters of Lake Chelan and the present facilities and cost of constructing, operating and maintaining pumps, docks, bathing boards and other like structures and that by reason of the appropriation and taking of said respondent's property and the operation and maintenance of the proposed project of the petitioner, Chelan Electric Company, it will cost more to install, operate and maintain such structures in the future, you are to consider the extra cost of such construction, operation and maintenance without regard to whether or not there are any such structures at present installed.

[fol. 291] Instruction No. 7

If you find that the remainder of the tract not taken has a value dependent on the present location of the water of Lake Chelan and which will be affected by the taking and appropriation of a part of the tract or by the maintenance and operation of the proposed project, you will fix and allow the full amount of depreciation in value of said remainder, if any, which will be caused thereby.

Instruction No. 9

You are further instructed that under the notice and petition in this proceeding the petitioner is seeking to raise the elevation of the waters of Lake Chelan and inundate the lands of the respondents described elsewhere in these instructions to a maximum elevation of 1,100 feet above mean sea level, still water measurement, and that as between the petitioner and the respondents the petitioner is not required to maintain the said water at any particular level any given time nor to raise said water to any particular level at any given time.

[fol. 292] [File endorsement omitted]

In Superior Court of Chelan County

Instructions to Jury—Filed June 30, 1927

Instruction No. 1

The evidence in this case being now closed, it is the duty of the court to charge you as to the law in the case, and at

the close of the argument of counsel for the petitioner and respondents it is your duty to deliberate upon the evidence and the law as laid down in the Court's instructions and to render your verdict thereon.

In order that you may have such aid as the Court may give you in understanding the case, the Court will briefly inform you as to the duties and functions of the various persons who take part in the trial.

Instruction No. 2

The attorneys represent the Petitioner and the Respondents, respectively and it is their duty to present the evidence and arguments in a proper manner. You may have observed, from time to time that the attorneys objected to questions asked of witnesses and to offers of evidence and have argued such objections to the court. This it was both their privilege and duty to do. In such arguments, however, they may have said things which to you appear to have the force of evidence; hence the court cautions you not to consider in the slightest any such arguments or statements made in arguments or on objections as evidence in considering your verdict. Arguments on objections during the trial of the case and all arguments made from time to time, except the final argument to you, are addressed to the Court, and are intended for the Court alone. Neither should you regard as evidence the opening statements of attorneys. By such opening statements the attorneys merely forecast what they expect to show by evidence to be received in the course of the trial. You should not regard the arguments made to you upon the evidence as evidence in the case. The sole purpose of final argument to the jury [fol. 293] is to assist the jury to a better understanding of the evidence that has been received and the application of the law thereto as contained in the Court's instructions. You should listen carefully to such arguments in order to get such help as you may therefrom in understanding the evidence and the law.

The duty of the judge is to see that the trial is conducted properly; to rule upon all questions of law which shall arise, and to instruct the jury upon the law of the case as the court is about to do in this case.

It is your duty, Members of the Jury, to be guided in your deliberations and to receive as the law the instructions which the Court gives you. Right or wrong, you must accept as the law of the case, the law as given in these instructions. If the Court errs in declaring the law, the law has provided a remedy by which such error can be corrected; that remedy is not in your province to administer.

You are not to be guided by what the Court may think the evidence to be or what you may believe the Court thinks the evidence establishes, but you must look to the evidence in the case and determine for yourselves what you may believe the evidence established.

In ruling upon objections from time to time in the course of the trial the Court may have said some things which would appear to you to indicate that the Court believed certain facts to be established. Statements of this kind, if any, made by the Court, are intended solely as the reasons for the admission of evidence along proper legal lines and not as a statement that any fact has been proven by evidence. The Court thereby means that, in the Court's judgment, certain testimony or evidence has been received, which if believed by the jury, would tend to establish certain contentions and render proper the admission of other evidence in support thereof or in contradiction thereof.

[fol. 294] The court is expressly prohibited from commenting upon the facts in any case, and if such comment has occurred, you are instructed that you must utterly disregard such comment and rely solely upon your own judgment as to what facts should be found from the evidence adduced.

It is your duty to decide all questions of fact.

Instruction No. 3

Should any appeal be made to your feelings or passions, it is your duty to disregard such appeal entirely, for your verdict must be based on the evidence and the instructions of the Court and on these alone.

You must carefully exclude any and all feelings of prejudice, bias, passion, interest and all things other than the evidence given in the trial of the case, and find your verdict from and base it upon the evidence alon*g* as received in this trial.

Instruction No. 4

The instructions given to the jury are and constitute one connected body and series and should be so regarded and treated by the jury; that is to say, you should apply them as a whole to the facts; that is, consider all of the instructions together as they may relate to the facts as shown by the evidence.

Instruction No. 5

The Chelan Electric Company, the petition-,is a public service corporation of the state of Washington, and as such has the right in these proceedings to take and appropriate the property of the respondents for the purpose of storing and impounding water in Lake Chelan in order to develop and utilize the water power afforded by Lake Chelan and the Chelan River. It has permits from the State Supervisor of Hydraulics of Washington, permitting it to appropriate water from Lake Chelan and Chelan River, to construct a reservoir and to store waters therein, and a permit from the Federal Power Commission of the United States for the construction, operation and maintenance of dams, reservoirs and other projects works necessary for the development and utilization of the water power afforded by the waters of Lake Chelan and the Chelan River. It is necessary for the Chelan Electric Company to construct, maintain and operate a dam and reservoir for the storage of the waters of Lake Chelan to a maximum elevation of 1100 feet, still water measurement, above mean sea level, to impound such waters and to inundate and overflow the land described in the bill of particulars in this action.

[fol. 295] Instruction No. 6

The object of this proceeding is to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by the petitioners, to the defendants, for the taking or injuriously affecting the premises described in the bill of particulars, and for a release from all liability for all damages to such premises in any manner arising from the impounding and storing of the waters of Lake Chelan and the Chelan River

to the elevation of 1100 feet, still water measurement, referred to. The Chelan Electric Company has already acquired, through purchase, the major portion of the property necessary for this power development. The use to which this power is to be put is a public use and the object for which the premises of the defendants are sought to be appropriated is a public object and use, and the public interest requires the prosecution of the enterprise of the Chelan Electric Company.

[fol. 296] Instruction No. 7

In this case the petitioner is seeking to acquire the right to inundate and overflow to an elevation of 1100 feet above mean sea level, still water measurement, the strip of land described in the bill of particulars, and also shown upon the map, which is in evidence, marked Petitioner's Exhibit 2, and damage the adjacent and contiguous property, the said overflow to be caused by a dam which the petitioner is constructing on the Chelan River a number of miles below the property in question. The petitioner is not seeking to acquire the fee simple title. When a person acquires a fee simple title to a tract of land he has ordinarily, under the law, the right to keep all persons off from that land. The petitioner, however, is seeking only an easement in said land; that is, the petitioner is seeking the perpetual right to overflow and inundate said lands to the elevation of 1100 feet above mean sea level, and the owner of the land, the respondents in this case, will retain all rights and privileges incident to the ownership of the real property not inconsistent with the right of the petitioner as above mentioned to inundate and overflow the said strip of land to an elevation of 1100 feet above mean seal level, still water measurement.

[fol. 297] Instruction No. 8

You are instructed that the evidence introduced herein by the petitioner shows that the County Road heretofore existing over a part of the property described in Petitioner's Exhibit 2 and the Bill of Particulars herein has been vacated by the County Commissioners of Chelan County and condemned by the petitioner herein in a sepa-

rate proceeding against the county and by a decree of this Court, and that upon vacation of a County Road running through the land of one owner, the title to the right of way so vacated reverts to the said owner and said owner is entitled to the full compensation to be allowed for the taking appropriating and damaging of the said land comprising said former right of way.

[fol. 298] Instruction No. 9

Even if you shall find that the water of Lake Chelan at the elevation of 1100 feet will interfere with, or take away the present access by road to Respondents' tract of land, nevertheless, if you shall further find that access to the tract will be supplied by a similar road before the present road is interfered with, which new road will be above the 1100 foot mark and will be as reasonably sufficient for the needs of respondent Wick as the present road, you will allow nominal damages only for the change in road. The respondent will be compensated either by agreement or in another proceeding, for the taking of the land for the new road and no allowance shall be made by you in this proceeding therefor.

[fol. 299] Instruction No. 10

You are further instructed that in considering the market value of the lands of Respondents you may not consider the making of any new road to be placed upon or taken from the respondent Wick's lands in the future nor may you consider any benefits or any damage by reason of such proposed new road. The taking of property for public highways and the awarding of damages therefor and the consideration of benefits or lack of benefits therein, is a matter for trial in an appropriate action for such purpose.

[fol. 300] Instruction No. 11

You are instructed that in this proceeding the only issue for you to determine is the amount of compensation which shall be paid by the Petitioner to the Repondents for the

property of said Respondents which is sought to be taken for flowage rights and for the depreciation, if any, in value of the remainder of said property by reason of such flowage.

Instruction No. 12

You are further instructed that under the constitution of this state as it applies to the issues before you:

Article I, Section 16, "No private property shall be taken or damaged for public use without full compensation having first been made or paid into court for the owner, irrespective of any benefit from any improvement proposed, which compensation shall be ascertained by a jury".

Instruction No. 13

You are further instructed that the right to take such property has been heretofore adjudged by the Court and that question is not a matter for consideration by you herein.

Instruction No. 14

You are further instructed that in arriving at the damages to be paid Respondents in this proceeding you may not take into consideration any benefits or presumed benefits by reason of Petitioner's proposed use of such property and that in any award which you shall make the Respondents are entitled to the fair cash market value of their property as taken or damaged by Petitioner, such value being determined as of the time of this trial, regardless of the causes which gave such real estate its value.

Instruction No. 15

You are further instructed that in a proceeding such as this now before you the Petitioner has the burden of proof, and must sustain such burden by a preponderance of the evidence.

[fol. 301] Instruction No. 16

The respondents are entitled to just compensation for the appropriation and use by the Petitioner of respondent's

land, real estate, premises or other property, and you shall ascertain, determine and award the amount of damages to be paid to the owner thereof for the taking of the easement which the petitioner seeks to take to inundate and overflow the land described in the bill of particulars to the maximum elevation of 1100 feet, still water measurement, together with the right to damage the respondents' land by wave wash, erosion, seepage, inundation or any similar cause, as the result of holding the waters of Lake Chelan up to the maximum elevation of 1100 feet, still water measurement; and, second, the amount of damage which you shall find the respondents are entitled to recover by reason of the decrease in market value, if any, to the balance of Respondents' tract occasioned by the taking of the easement just referred to.

[fol. 302] Instruction No. 17

Just compensation means equitable compensation; that the owners shall be saved harmless as near as may be, and shall recover the damage which the respondents have actually sustained.

It does not mean that the owners shall be allowed to acquire and appropriate any more money from the petitioner than that which is necessary for fair and adequate compensation for respondent's loss or injury. It is the equivalent for the value of the easement taken and the depreciation, if any, in the market value of the balance of the tract. Anything beyond that is more than compensation. Anything short of it is less. This equivalent is for the present value, that is, at the time of taking, and not for the future value. It is not intended that compensation shall extend to loss or injury which the land owner does not have at the time of taking.

[fol. 303] Instruction No. 18

In ascertaining the value of property as taken in this case, the jury are instructed that they are to determine its fair market value as of the time of this trial.

By "the market value of property" is not meant what could be obtained for it at forced sale, or at a sudden demand for the sale thereof, but the market value referred to is when the man owning the property is willing, but not obliged, to sell it, and the party to whom it is offered is willing, or desires to purchase the same but is not obliged to do so.

[fol. 304] Instruction No. 19

The market value of the land is to be estimated with reference to the uses and purposes for which it is adapted and any special features which may enhance its marketability may properly be considered. The fact, however, that the land is needed by the Chelan Electric Company upon which to store water is not to be regarded as an element of the value to be ascertained. The question of market value is not what the property is worth to the Chelan Electric Company, nor the purpose for which the water is to be used, but what could probably be realized from its sale to any purchaser who might desire it for any or all of the purposes for which it is available.

[fol. 305] Instruction No. 20

In determining whether the respondents' property has a market value for any special use, it must appear that such property is available and adaptable for such use. To be available, however, does not refer to a future possibility, but to a present capacity for a use which may be anticipated with reasonable certainty and made the basis of an intelligent estimate of value. In fixing the market value for uses to which it has never been applied, its availability for future uses must be such as enter into and effect its market value, and regard must be had to the existing wants of the community or such as may be reasonably expected in the immediate future. The location of the property, its surroundings, and all other things tending to show its market value are to be considered but nothing should be allowed for imaginary or speculative damages or such remote or inappreciable damages as may be conjured up by the immigration and which may or may not occur in all the future.

[fol. 306] Instruction No. 21

In fixing the market value of the property involved, the jury is not permitted to enter the realm of speculation or to enlarge damages beyond present cash value under fair conditions. It is not what the property may be worth at some distant day in the future, but what it is worth now, taking into consideratioon everything properly entering into its present value, including its availability for the special purposes for which it is claimed it may be used, within such time as gives additional value to it when sought to be condemned.

[fol. 307] Instruction No. 22

You are not to consider any value which might be suggested for the land in exception(al) *of* unusual instances, or under peculiar conditions or circumstances not shown to exist, and which do not tend to show the fair cash market value of the land. You will not, therefore, take into consideration any peculiar value which the land might have to the owner apart from what would be paid by the general public, nor will you consider the owner's unwillingness, if any appears, to sell the land. Further, the damages and the value of the property taken cannot be measured by the value of the property to the party condemning it; that is, the petitioner in this case, nor can it be measured by the petitioner's need for the particular property. In arriving at the estimate of the damages in this case the jury will not take into consideration anything as an element of damages which is remote or uncertain, indefinite or speculative, but the only element which you will take into consideration as tending to reduce the market value of the land not taken are those elements which are appreciable, substantial and which will actually lessen the value of the land not so taken.

[fol. 308] Instruction No. 23

You are further instructed that in determining the value of land appropriated for general public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must

be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities or conveniences of life. The compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

In estimating the value of the real estate you may consider all of its capabilities and all of the uses to which it is applied, and for which it is adapted, but you shall not consider the fact, if you find such fact to be, of the unwillingness of the owner to sell or dispose of said property.

[fol. 309] Instruction No. 24

You are not to consider what the property sought to be condemned is worth to the owners for speculation, or merely possible uses, what the respondents claim it is worth to the respondents, what the property would bring at a forced sale, or what the property would sell for under special or extraordinary circumstances.

The market value of the land sought to be taken should be ascertained for all purposes for which it is shown to be available, and this value should be arrived at by testing it to find out what advantages it possesses in and of itself, for the particular purposes — which it is claimed to be valuable.

In no event can you consider any evidence based on the storage capacity of the lake, or what it may be worth to the petitioner for reservoir or other purposes.

[fol. 310] Instruction No. 25

You are instructed that by "fair, cash market value" is meant the price which the property will bring when it is offered for sale, for cash, by one who desires but is not

obliged to sell it and is bought by one who is under no necessity of having it. It is not the value put on the property by the owner because of any sentiment which he has for the property nor because he may be unwilling to sell it.

[fol. 311] Instruction No. 26

You are further instructed that under the notice and petition in this proceeding the petitioner is seeking to raise the elevation of the waters of Lake Chelan and inundate the lands of the respondents described elsewhere in these instructions to a maximum elevation of 1100 feet above mean sea level, still water measurement, and that as between the petitioner and the respondents the petitioner is not required to maintain the said water at any particular level at any given time nor to raise said water to any particular level at any given time.

[fol. 312] Instruction No. 27

In determining the question of depreciation in market value you will take into consideration as elements of damage, as such may be shown from the evidence, the reasonable cost, if any, to permit the respondents to use and enjoy their property for any purpose for which it is now used or to which it may be reasonably put in the immediate future, including necessary docks, or landings, if any, and pumping plants, if any; and you will allow such reasonable sum on account thereof as you shall find from the evidence the fair cash market value of respondents' land and premises will be depreciated, if any; and such allowance, if any, may be made only to the extent of the depreciation in market value of said lands and premises.

[fol. 313] Instruction No. 29

You are further instructed that by preponderance of the evidence, as used in these instructions, is meant that greater and superior weight of the evidence which satisfies your minds.

Preponderance is not alone determined by the number of witnesses testifying to a particular fact or circumstance

or state of facts. If the material allegations of the cause are proven by such evidence as satisfies and produces conviction in your minds then the case has been proven by a preponderance of the evidence.

After fairly and impartially considering and weighing all the evidence in this case, the jury are at liberty to decide that the preponderance of the evidence is on the side which, in your judgment, is sustained by the more intelligent, the beetter informed, the more credible and the more disinterested witnesses, whether these are the greater or the smaller number.

The jury have no right, however, to capriciously disregard the testimony of the larger number of witnesses, nor to refuse to give whatever consideration, in your judgment, should be attached naturally to the fact, if it be a fact, that the larger number of witnesses have testified one way.

The element of numbers is proper to be considered with all the other elements for whatever, in the judgment of the jury, that element is worth, and the evidence of the smaller number of witnesses cannot be taken by the jury in preference to that of the larger number, unless the jury can say, on your oaths, that from all the facts and circumstances in the case it is more reasonable, more truthful, more disinterested and more credible.

[fol. 314] Instruction No. 30

In estimating damages the jury are to value the injury to the land owners without reference to the person of the owners or the state of their business. Damages cannot be allowed for an actual or supposed loss of profits on any business carried on upon the premises, or for inconvenience to the owners, damage to personal property, or the expense of removing it. Loss of profits are too speculative, remote and uncertain to be considered as a basis for ascertaining the market value of the property in this proceeding. The test is not what the land owner makes, but what is the market value of the land.

[fol. 315] Instruction No. 31

You have been permitted to view the premises involved in this action, which will be affected by the making of the

proposed changes, for the purpose of enabling you to better arrive at a correct determination of the questions submitted to you. You should, therefore, trust somewhat to your own judgment, in arriving at such determination.

One of the objects and purposes of the view which you have made, is to enable you to use your own judgment and senses, by obtaining such information as an eye witness can gain, of the character and condition of these premises, the uses to which they have been put, and to which they are applicable, the surroundings and conditions which are considered by reasonable men, in determining the value of the properties.

Another object is to enable you to better understand and apply the evidence of the witnesses who have testified before you, and you should remember, as part of the evidence in this case, what you have seen in viewing the premises. You have the right, and it is your duty, to use your senses, and to consider in arriving at your verdict, the knowledge and information acquired by such view.

In this case it is your duty to harmonize the testimony of the witne*ese*, if possible, so as not to impute false swearing to any witness. If this can be done consistently with the truth you should do so, but if you find it impossible to harmonize the testimony, and if you find further from the evidence of your senses of view, or from the testimony on the stand, that any witness has wilfully testified falsely concerning any material fact in the case, then you have the right to disregard his entire testimony, except insofar as you may find that the testimony of such witness is corroborated by other credible evidence or by facts and circumstances proved on the trial. And if, in your judgment, the [fol. 316] evidence is conflicting as to the value of the property and the amount of damages, you should resort to the knowledge gained by your view as bearing upon the weight to be given to the various and conflicting estimates and statements.

Instruction No. 32

You are further instructed that you are the sole judges of the facts in this case, and of the credit, if any, to be given to the respective witnesses who have testified. In deter-

mining the facts, it is your duty to consided the appearance and demeanor of the witnesses while on the witness stand, their manner of testifying, their apparent candor and frankness or lack of it, their bias or prejudice for or against the petitioner or respondents, if any shown, their apparent intelligence or lack of it, their interest in the result of the case, if any, their means of knowing the facts and circumstances in proof, if any, and all their surrounding circumstances, and determine the witness or witnesses most worthy of credit and give credit accordingly.

You have a right, in weighing the testimony, to judge from your own common observation of the ability to judge given facts from given opportunities, and you are not obliged to accept as true the testimony of any witness or witnesses if, in your opinion, judging from such common observation, they are or may be mistaken concerning the facts of which they speak.

[fol. 317] Instruction No. 33

If you, the jury, believe from the evidence that any witness in this case has wilfully sworn falsely on this trial as to any matter or thing material to the issues of the case, then the jury are at liberty to disregard the entire testimony of such witness, except insofar as such testimony has been corroborated by other evidence, or by the facts and circumstances proved on the trial.

The law does not say that you must disregard such evidence because such witnesses' testimony may be supported by other evidence such as to give the witness' story credit, but if you are satisfied that any witness wilfully testified falsely as to any one material thing, it is sufficient for you, if you think proper so to do, to disregard the entire testimony of such witness.

[fol. 318] Instruction No. 34

You are not to arrive at your verdict by lot or chance, nor should you render a quotient verdict. That is to say, you should not agree to be bound by the result of adding the individual amounts found by each juror to be his or her appraisal of damages, and then divide the total of these amounts by the number of jurors. Your verdict should be

based upon the judgment of all the jurors, or at least ten of your number, as to what in your opinion is the amount of damages that the respondents are entitled to, as I have defined the rights of the respective parties in these instructions.

[fol. 319] Instruction No. 35

In order to assist you in arriving at a fair and just verdict, in this case, and to advise the court of your conclusions as to each item, I will submit to you four special interrogatories, to each of which the answer is to be determined in the same manner you arrive at your general verdict,—that is, when ten of your number have agreed upon the answer, it is to be filled in and signed by your foreman. These interrogatories are:

1. What is the fair market value of the entire tract of the respondents shown as Exhibit 2? $—.

2. What is the fair market value of the strip of land proposed to be acquired by the petitioner, Chelan Electric Company, and including damage, if any, to the land of Respondent Alice Barbee Wick, by wave wash, erosion, seepage, inundation, or any similar cause, as the result of holding the waters up to the maximum elevation of 1100 feet, still water measurement, above mean sea level? $—.

3. State whether or not the remainder of the land owned by respondent Wick is diminished in market value by the taking of the strip referred to in Interrogatory No. 2, for the purpose stated in the petition. $—.

4. If you answer the foregoing interrogatory in the affirmative, then state how much the tract described in the preceding interrogatory is damaged or decreased in value. $—.

[fol. 320] Instruction No. 36

Upon the conclusion of argument by counsel for the respective parties you will retire to your jury room in charge of the bailiff and consider of your verdict.

One from among your number will be selected by you to act as your foreman and when you have arrived at a verdict, you will cause your foreman to sign that form which correctly embodies the result of your deliberations, announce the fact of your agreement to the bailiff in charge, who will communicate with the court, and return you into court for its reception.

The instructions as given by the court, the petition in the case, exhibits received in evidence and blank forms for your verdict and interrogatories will be handed to your foreman by the bailiff. These papers and exhibits you will carefully preserve without alteration or mutilation, and deliver to the bailiff at the close of your deliberations excepting the signed verdict and interrogatories, which your foreman will retain until it can be delivered in open court.

Ten of your number must agree before you can render a verdict in this case.

[fol. 321] In Superior Court of Chelan County

[Title omitted]

Verdict

We the jury in the case of Chelan Electric Company, a corporation, plaintiff, vs. Alice Barbee Wick, et al., defendant, find the full compensation to be paid to the owners, and all tenants, encumbrancers, and others interested, for the taking or injuriously affecting the land, real estate, premises, and property described in the petition and bill of particulars in this action, and lands lying contiguous or adjacent thereto, together with the expense of reconstructing or replacing docks, and the acquiring by petitioner of the rights, and securing the release referred to, is the sum of $13,500. no/100.

Dated at Wenatche, Washington, this 30 day of June, A. D. 1927.

Ira C. Parsons, Foreman.

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

ANSWERS TO INTERROGATORIES—Filed June 30, 1927

1. What is the fair market value of the entire tract of land owned by the respondents as shown by the evidence.
Answer. $48,000 no/100.

2. What is the fair market value of the strip of land proposed to be acquired by the petitioner, Chelan Electric Company and including damage, if any, to the land of respondent, Alice Barbee Wick, by wave wash, erosion, seepage, inundation, or any similar cause, as a result of holding the waters of the lake up to the maximum elevation of 1100 feet, still water measurement, above mean sea level?
Answer. $12,500.

3. State whether or not the remainder of the land owned by respondent Alice Barbee Wick, is diminished in market value by the taking and inundation of the strip referred to in interrogatory No. 2, for the purpose stated in the petition.
Answer. Yes.

4. If you answer the foregoing interrogatory in the affirmative then state how much the said remainder of said land is damaged or decreased in value.
Answer. $1,000.

Dated this 30 day of June, 1927.

Ira C. Parsons, Foreman of the Jury.

[File endorsement omitted.]

[fol. 322] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

EXCEPTIONS TO INSTRUCTIONS GIVEN AND TO REFUSING OF INSTRUCTIONS BY RESPONDENT ALICE BARBEE WICK—Filed July 2, 1927

Comes now the respondent, Alice Barbee Wick, by Adrien W. Vollmer, A. N. Corbin, John B. Shorett and J.

L. Baldwin, as attorneys of record herein, and still preserving her special appearance and objecting to the jurisdiction of the court both on the ground of defective service of process or notice and on the further ground of loss of jurisdiction by reason of the Respondent's petition for Removal to the District Court of the United States, and, reserving any right which she may have to file further and additional exceptions, within the time limited by law for filing said exceptions, and reserving the right to withdraw these exceptions and file other exceptions in place thereof within said time, and excepts to the instructions as given by the Court in the above entitled proceeding, filed June 30, 1927, or thereafter.

1. Except to instruction No. 5 as given for the reasons that the same is contrary to law and the evidence; that it is a charge upon an abstract principle and not upon an issue of law or fact before the jury for determination; that it is argumentative; that it is a comment on the facts.

2. Except to Instruction No. 6 as given for the reasons that the same is contrary to law and the evidence; that it is a charge argumentative in nature; that it unduly limits the premises which are involved in the action and excludes lands involved in the proceedings and not described in the Bill of Particulars; that it is a charge upon an abstract question and not upon any issue for the jury to decide; that it is a comment on the facts.

3. Except further to that portion of Instruction No. 6 as follows: "The Chelan Electric Company has already ac- [fol. 323] quired, through purchase, the major portion of the property necessary for this power development," for the reasons that have been heretofore stated and for the further reason that the same is a charge upon a matter which is not an issue either of law or fact for the jury to consider; that the same is a comment upon the Respondent's situation as compared with other property owners who may have surrendered to the condemning party, and highly prejudicial to the rights of Respondents to a fair and impartial trial.

4. Except to instruction No. 7 as given for the reasons that the same is contrary to law and the evidence; that it

is a comment upon disputed issues of fact as to areas; that it unduly restricts the consideration of the jury to the strip described in the Bill of Particulars and excludes damages to other lands not shown therein; that it submits to the jury to determine as a matter of law what rights, if any, and privileges, if any, the respondent will retain and the Petitioner take. That it is a charge upon a matter not at issue under the Notice and petition under which the Petitioner seeks to acquire rights sought in this proceeding.

5. Except to instruction No. 9 as given for the reason that the same is contrary to law and the evidence, that it is a comment upon issues of fact not relevant to this issue.

6. Except to instruction No. 16 as given for the reasons that the same is contrary to law and the evidence; that it is in conflict with other instructions as to the elevation and the amount of property which is sought to be taken and damaged.

7. Except to instruction No. 17 as given for the reasons that it is contrary to the evidence and the law; that it is argumentative; that it is in conflict with other instructions given upon the question of compensation.

8. Except to Instruction No. 18 as given for the reasons that the same is contrary to the law and the evidence; that it is in conflict with other instructions given on market value; that it restricts the determination of values shown or proposed to be shown on the date of their verdict and excludes from consideration of the jury the value at the time of trial, irrespective of the effect of Petitioner taking or damaging of Respondent's property upon such value at the time of trial. That it withdraws from the jury as an element of value "a sudden demand for the sale thereof," such sudden demand being an element of value under the law.

9. Except to instruction No. 19 as given for the reasons that the same is contrary to law and the evidence.

10. Except to instruction No. 20 as given for the reasons that the same is contrary to law and the evidence and for the further reasons as given in exceptions to No. 21 following.

11. Except to Instruction No. 21 as given for the reason that it is contrary to law and the evidence; that it is a comment on the facts; that it leaves to the determination of the jury as a matter of law what elements enter into market value; that it gives undue prominence to speculative values and by inference, in connection with other instructions amounts to a charge that Respondent's evidence of value is speculative.

12. Except to Instruction No. 22 as given for the same reason as assigned for Instruction No. 21, supra.

[fol. 324] 13. Except to instruction No. 24 as given for the reasons that it is contrary to law and the evidence; and for the further reasons as assigned for Instruction- No. 21 and 22, supra; that it is in conflict with other instructions given; that it excludes from consideration as an element of value the location of the property with regard to its surroundings and the general attractiveness of that surrounding as a resort.

14. Except to Instruction 27 as given for the reasons that it is contrary to law and the evidence; that it permits the jury to consider costs of removal of permanent buildings or structures upon the land and which would in law be a part of that land required to be valued as such and submits an erroneous element of purported salvage thereof to be cast upon the Respondents in lieu of compensation in money; and raises a wrong inference and is contradictory, ambiguous and indefinite in its meaning.

15. Except to instruction No. 29 as given for the reasons that the same is contrary to law and the evidence; and for the further reason that under the evidence adduced it amounts to a comment on the evidence, the witnesses preponderating in numbers in favor of the Petitioner on the issue of value and damages.

16. Except to Instruction No. 30 as given for the reason that the same is contrary to law and the evidence in that the fact of an existing and going business in the location involved is an element to be considered in arriving at the value of the land taken; that it excludes values for resort purposes as such; that it prevents the consideration of the

jury of any evidence indicating the probable value of the same or of the premises proposed to be flooded or otherwise injuriously affected.

17. Except to Instruction No. 31 as given for the reasons that the same is contrary to law and the evidence; and especially except to that portion thereof reading as follows: "You should, therefore, trust somewhat to your own judgment, in arriving at such determination," for the reasons that in connection with that portion thereof reading "for the purpose of enabling you to better arrive at a correct determination of the questions submitted to you" that each and every thereof is a permission to the jury to consider matters other than the evidence in the case as presented to them in the trial of the cause.

18. Except to Instruction No. 34, as given for the reasons that the same is contrary to law and the evidence; that an agreement to be bound by such a verdict made after deliberation as to the amount as thus arrived at and adoption of such as the independent views of the individual jurors is not a quotient verdict.

19. Except to instruction No. 35 as given for the reasons that the same is contrary to law and the evidence and the facts; that there was no evidence given as to the value of only that portion of Respondent's lands as shown on Petitioner's Exhibit 2. That said instruction was ambiguous and indefinite and described the land to be flooded by the Petitioner in a manner different from the notice and petition in this cause of action against the said non-resident Respondent, Alice Barbee Wick.

20. Except to any instruction of the court by which the premises to be taken or injuriously affected are described differently from the same as described in the original Notice [fol. 325] and Petition in this cause of action, and excepts to each and every instructions of the court under which any inference is given that land above the 1100 ft. mean sea level which will be eroded or otherwise affected by wave wash, is land not flooded but is laand injurously affected.

21. Except to each and every instruction of the Court in which the 1100 level is referred to as 1100 feet "still water measurement" or otherwise differently than it was

referred to in the original Notice and Petition in condemnation.

22. Except to each and every instruction of the Court in which the title pretended to be acquired by the Petitioner in these condemnation proceedings is described differently in said instructions than it was in the original Notice and Petition in this cause of action.

23. Exceptions to refusal of instructions: Except further to the refusal of the Court to give each and every of the special requests for instructions numbered 1 to 9 both inclusive, as heretofore filed in said cause and presented to the court as the same appear in the records and files herein.

24. Except to the refusal of the court to give the special request No. 1 as to the measure of damages, etc.

25. Except to the refusal of the Court to give the special request No. 2 as to the burden of proof, etc.

26. Except to the refusal of the Court to give special request No. 3 as to the market value, etc.

27. Except to the refusal of the court to give the special request No. 4 as to depreciation, etc.

28. Except to the refusal of the court to give the special request No. 5 as to measure of damages to the remainder, etc.

29. Except to the refusal of the court to give the special request No. 6 as to measure of damages to the remainder, etc.

30. Except to the refusal of the court to give the special request No. 7 as to depreciation of value of the remainder, etc.

31. Except to the refusal of the court to give the special request No. 9 as to requirements for maintaining certain water levels, etc.

32. Except to the refusal of the Court to give the special request No. 3-A as to the market value, etc.

Adrien W. Vollmer, Adrien W. Vollmer, A. N. Corbin, A. N. Corbin, Per A. N. C., John B. Shorett, John B. Shorett, per A. N. C., J. L. Baldwin, per A. N. C., J. L. Baldwin, Attys. for Respondent Alice Barbee Wick.

Service by true copy admitted this — day of July, 1927.
—— ——, Attys. for Petitioner.

[fol. 326] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed July 2, 1927

Comes now the respondent, Alice Barbee Wick, and still preserving and not waiving her special appearance, and objecting to the jurisdiction of the Court both on the ground of defective service of process or notice and on the further ground of loss of jurisdiction by reason of said respondent's petition for removal to the District Court of the United States, moves the court to set aside the verdict of the jury herein and to grant a new trial of said cause, upon the following grounds and for the following causes, to-wit:

1. Irregularity in the proceedings of the court, jury and adverse party and the orders of the court and abuse of discretion by which said respondent was prevented from having a fair trial;

2. Misconduct of Petitioner and the jury;

3. Accident and surprise which ordinary prudence could have guarded against;

4. Newly discovered evidence, material for said respondent making this application, which she could not with reasonable diligence have discovered and produced at the trial;

5. Inadequate damages appearing to have been given under the influence of passion or prejudice;

6. Error in the assessment of the amount of recovery in that it is too small;

7. Insufficiency of the evidence to justify the verdict and that the verdict is against the law;

8. Error in law occurring at the trial and excepted to at the time by the party making this application.

[fol. 327] Adrien W. Vollmer, Adrien W. Vollmer, J. L. Baldwin, J. L. Baldwin, Attorneys for Petitioner Alice Barbee Wick, 530 Burke Building, Seattle, Washington.

Copy of the foregoing motion for new trial received this 1st day of July, 1927.

Post & Russell, Charles S. Albert, Edwin C. Mathias, Attorneys for Petitioner.

[fol. 328] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

ADDITIONAL EXCEPTIONS TO INSTRUCTIONS GIVEN AND TO REFUSING OF INSTRUCTIONS BY RESPONDENT ALICE BARBEE WICK—Filed July 7, 1927

Comes now the respondent, Alice Barbee Wick, by Adrien W. Vollmer, A. N. Corbin, John B. Shorett and J. L. Baldwin, as attorneys of record herein, and still preserving her special appearance and objecting to the jurisdiction of the Court both on the ground of defective service of process or notice and on the further ground of loss of jurisdiction by reason of the Respondent's Petition for Removal to the District Court of the United States, and makes further and additional exceptions to the Instructions as given by the court in the above entitled proceeding filed June 30, 1927 or thereafter.

1. Except to Instruction No. 1 as given wherever same says "Respondents" as erroneous in law and not applicable to the facts or the evidence and submitting a false issue, and contradictory to other instructions, in that it leaves it open for the jury to award part of the damage to the county.

2. Except to Instruction No. 2 as given for the same reasons as assigned to No. 1 supra.

3. Except further to instruction No. 5 as given for the further reasons as assigned to No. 1 supra; and for the further reason that it is immaterial and submits to the jury immaterial issues and evidence and is a comment upon the evidence or the facts, and submits to the jury as having a binding force upon this respondent or a material bearing in this case, a Permit from or contract of the Petitioner with the State Supervisor of Hydraulics of the State of Washington and the Federal Power Commission of the United States Government, neither of which has any validity which is available to this Respondent.

4. Except further to Instruction No. 6 as given for the further reason that it is submitting immaterial issues and commenting on the evidence and facts and deciding the facts, which is solely within the province of the jury.

[fol. 329] 5. Except further to Instruction No. 7 as given for the reason that it is not applicable to the facts and submits false issues as to the County, etc.

6. Except further to Instruction No. 9 as given for the further reason that the same is erroneous and misleading, not applicable to the facts or evidence, in this case, and further, because there is no evidence in this case of the acquisition or building of any new road, but the evidence shows that the old road has been vacated and is now the property of this respondent free and clear of any easement.

7. Except to Instruction No. 10 as given for the reason that the same is erroneous in law and misleading and not applicable to the facts or the evidence in this case, and that there is no evidence in this case of the acquisition or building of any new road on this property, and invites the jury to reduce its award because there will be another award in another case.

8. Except to Instruction No. 11 as given for the reason that the same is erroneous in law and misleading, not applicable to the facts or the evidence in this case, submits a false issue and is contradictory to the other instructions in permitting the jury to divide the damages with the county.

9. Except to Instruction No. 14 as given for the same reason as assigned for Instruction No. 11 supra.

10. Except to Instruction No. 15 as given for the reason that the same is erroneous and not a proper statement of the law.

11. Except further to Instruction No. 17 as given, for the further reason that the same is highly prejudicial in submitting to the jury the implication that the Respondent is taking and appropriating the property of the Petitioner, instead of the reverse, and so puts the burden of proof upon the respondent as well. This instruction shows apparent animus of the court.

12. Except further to Instruction No. 18 as given for the reason that same is misleading, not applicable to the facts or evidence of this case and not the proper measure of damages.

13. Except further to Instruction No. 20 as given for the further reason that the same is misleading and prejudicial and unduly limiting the future time with reference to which the present market value may be found. ("Immediate future").

14. Except further to Instruction No. 21 as given for the further reasons that it is prejudicial in repetition and emphasis and unduly limiting the statement of value and the wrong measure of damages.

15. Except further to Instruction No. 22 as given for the further reason that it is not applicable to the facts or the evidence, prejudicial in repetition and emphasis of matter given in other instructions, and a wrong statement of the law with reference to measure of damages and with reference to unwillingness to sell, which has already been referred to once or twice.

[fols. 330-332] 16. Except to Instruction No. 23 as given for the reason that it is erroneous in law and not applicable to the facts or the evidence, and particularly except to the statement as to the estimation of compensation as limiting the demand to too small a territory, and too restricted in time in the future as to prospective wants. And particularly the last paragraph in said instruction as to the unwillingness of the owner, as a prejudicial repetition and undue emphasis.

17. Except further to Instruction No. 24 as given for the further reason that it is prejudicial in repetition and undue emphasis.

18. Except to Instruction No. 25 as given for the reason that it is erroneous in law and not applicable to the facts and the evidence in this case, given under undue emphasis by repetition, and in the use of the word "crash."

19. Except further to Instruction No. 31 as given for the further reason that the purpose of a view is not to give a substitute for evidence, but only to enable the jury to better understand the evidence given. The court says "Remember as part of the evidence what you have seen."

Adrien W. Vollmer, Adrien W. Vollmer, A. N. Corbin, A. N. Corbin, John B. Shorett, J. L. Baldwin, Attorneys for Respondent Alice Barbee Wick.

Service by true copy admitted this — day of July, 1927.
—— ——, Attorneys for Petitioner.

[fol. 333] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

No. 7391

CHELAN ELECTRIC COMPANY, a Corporation, Petitioner,
vs.
ALICE BARBEE WICK and CHELAN COUNTY, WASHINGTON, a Municipal Corporation, Respondents

JUDGMENT ON VERDICT—Filed July 9, 1927

This cause having come regularly on for trial before the above entitled court, Honorable W. O. Parr, Judge thereof,

and a jury, at the Court House in the City of Wenatchee, Chelan County, Washington; the petitioner appearing by its attorneys Charles S. Albert, and Edwin C. Matthias, and the Respondent, Alice Barbee Wick appearing by her attorneys A. N. Corbin, Adrien W. Vollmer, Julius Baldwin and John B. Shorett, and respondent, Chelan County, Washington, appearing by its attorney J. A. Adams, and it appearing to the court that an order adjudicating public use and necessity has heretofore been entered herein, and a jury having been sworn to try the issues herein, and having duly returned its verdict making an assessment of damages to the Respondent, Alice Barbee Wick, herein, by reason of the appropriation and use of the property described in the petition and bill of particulars herein, and having ascertained, determined and awarded the amount of damages to be paid to the owners of such property, and to all tenants, encumbrancers and others interested, for the taking or injuriously affecting such land, real estate, premises or other property, and for acquiring the rights and securing the release hereinafter referred to, for the purpose of the enterprise of the petitioner herein, irrespective of any benefits from any improvements proposed by the [fol. 334] Petitioner; such verdict being in the amount of $13,500.00;

It is ordered, adjudged and decreed, That just compensation be paid by the Chelan Electric Company to the owner of said property, Alice Barbee Wick, and to all tenants, encumbrancers and others interested, for the taking and injuriously affecting such land, real estate premises or other property, and for acquiring the rights and securing the release hereinafter referred to, in the sum of $13,500.00, with costs to the Respondent Alice Barbee Wick, to be taxed in the usual manner.

It is further ordered, adjudged and decreed, That said Respondent Alice Barbee Wick, do have and recover from the Chelan Electric Company said sum for the taking and appropriating of the lands, real estate, premises property rights and interest, owned by said Respondent in said property hereinafter described, for the uses set forth in the petition on file herein, and for acquiring the rights and securing the release set forth in said petition, order and bill of particulars, and upon payment by the Chelan Elec-

tric Company of said just compensation and damages to said Respondent, interested in said premises as owner, and to those interested as tenants, encumbrancers or otherwise, or upon depositing the same for the use and benefit of said persons, with the clerk of the above entitled court, to be paid out under the direction of said court or the judge thereof, that the property and rights hereinafter described, free and clear from all liens and encumbrances of every nature whatsoever, shall pass to and become vested in the Chelan Electric Company, a corporation, for the uses and purposes hereinafter set forth. The property and rights hereby condemned and appropriated to the use of the Chelan Electric Company are situated in the County of Chelan, State of Washington, and described as follows, to-wit:

The right in perpetuity to inundate and overflow, by impounding the waters of Lake Chelan and the Chelan River, and raising the same to the maximum elevation of 1100 [fol. 335] feet, still water measurement, above mean sea level, and to damage the land herein described, and all lands of the respondent, Alice Barbee Wick, lying contiguous or adjacent thereto, by wave wash, erosion, seepage, inundation or any similar cause, as a result of holding the waters to said elevation, and included in the following described real estate, situate in the County of Chelan, State of Washington, particularly described as follows, to-wit:

Government Lots one (1) two (2) three (3) and four (4) and the southwest quarter of the southwest quarter of section three (3) lots five (5) and six (6), section four (4), Lot One (1), section ten (10), Lot forty-two (42), Section eleven (11); and lot forty-three (43), all in Township twenty-seven (27) North Range twenty-one (21) E. W. M., together with all shore lands of the second class, situated in front of, adjacent to or abutting upon that portion of the Government Meander line lying in front of the above described property, and all littoral and riparian rights thereinto belonging or appertaining, subject to the right of the Chelan Electric Company to perpetually back and hold water upon and over the shore lands situate in front of, adjacent to, or abutting upon that portion of the Government Meander line lying in front of Lot One (1), Section Ten (10), and Lot four (4), Section three (3), Township twenty-

seven (27) North, Range twenty-one (21) E. W. M., and to overflow and inundate the same to the high water mark of Lake Chelan, as granted by the order of the State Board of Land Commissioners, dated December 6th, 1909 (Application No. 7077), under and by virtue of Chapter 125, Session Laws of 1907.

The lands to be inundated and overflowed being situated in said County and State, and a metes and bounds survey description thereof being as follows, to-wit:

All that part of Government Lot 43, section 12, township 27 North Range 21 E. W. M., together with all shore lands of the second class, situated in front of, adjacent to, or abutting upon that portion of the Government Meander Line lying in front of the above described property more particularly described as follows, to-wit: Beginning at a point in the west boundary of section 12, distant 3589.1 feet from the southwest corner thereof, thence in a southeasterly direction along a direct line making a southeasterly included angle of 87 degrees and 44 minutes with said boundary a distance of 123.6 feet, thence angle right 35 degrees 22 minutes 229.8 feet, thence angle right 4 degrees 35 minutes 173.6 feet, thence angle right 4 degrees 31 minutes 95.2 feet, thance angle right 12 degrees 45 minutes 246.2 feet, thence angle left 13 degrees 42 minutes 192.4 feet, thence angle right 5 degrees 19 minutes 121.8 feet, thence angle right 15 degrees 25 minutes 228.7 feet, thence angle left 18 degrees 26 minutes 368.1 feet, thence angle left 16 degrees 42 minutes 128.5 feet; thence angle right 7 degrees 43½ minutes 122.11 feet thence angle left 2 degrees 36 minutes 133.7 feet, thence angle right 4 degrees 10 minutes 91.1 feet, thence angle left 7 degrees 25 minutes 138.4 feet, thence angle right 4 degrees 36 minutes 143.9 feet, thence angle right 7 degrees 8 minutes 202.6 feet; thence angle left 26 degrees 11½ minutes 115.7 feet, thence angle right 25 degrees 35 minutes 105.4 feet, thence angle left 31 [fol. 336] degrees 57 minutes 198.6 feet, thence angle right 12 degrees 51 minutes 231.2 feet, thence angle left 34 degrees 38 minutes 134.2 feet, thence angle right 20 degrees 52 minutes 89.9 feet to a point in the east boundary line of Lot 43, Section 12 distant 874.6 feet from the southeast

corner thereof, thence north along said boundary a distance of 168.0 feet more or less to the northerly boundary of the shore lands, thence northwesterly along said boundary of shore lands lying in front of Government Lot 43 to an intersection with the west boundary of section 12 (produced) thence south along the west boundary of section 12 a distance of 125.0 feet more or less to the point of beginning, containing an area of 7.10 acres, more or less, situated in Chelan County, State of Washington.

All that part of Government Lots 42 and 43, section 11, Township 27 North Range 21 E. W. M., together with all shore lands of the second class, situated in front of, adjacent to, or abutting upon that portion of the Government Meander line in front of the above described property, more particularly described as follows, to-wit: Beginning at a point in the eats boundary line of section 11, Township 27 North Range 21 E. W. M., distant 3589.1 feet from the southeast corner thereof thence northwesterly along a direct line making a northwesterly included angle of 87 degrees and 44 minutes with said boundary a distance of 20.0 feet, thence angle right 20 degrees 15 minutes 96.5 feet, thence angle left 19 degrees 17 minutes 132.5 feet, thence angle *angle* left 31 degrees 12 minutes 204.8 feet, thence angle right 19 degrees 58 minutes 305.5 feet, thence angle right 24 degrees 1 minute 341.6 feet; thence angle left 12 degrees 9 minutes 257.5 feet, thence angle left 4 degrees 20 minutes 580.0 feet, thence angle right 7 degrees 6 minutes 170.0 feet, thence angle left 24 degrees 5 minutes 250 feet, thence angle right 11 degrees 21 minutes 182.0 feet, thence angle left 27 degrees 22 minutes 143.0 feet, thence angle right 23 degrees 38 minutes 300.0 feet, thence angle right 17 degrees 44 minutes 133.0 feet, thence angle right 13 degrees 55 minutes 222.0 feet, thence angle left 18 degrees 55 minutes 97.0 feet, thence angle left 14 degrees 40 minutes 103.0 feet, thence angle right 22 degrees 28 minutes 240 feet, thence angle right 27 degrees 53 minutes 395.0 feet, thence angle left 20 degrees 40 minutes 78.0 feet, thence angle left 26 degrees 10 minutes 119 feet, thence angle right 17 degrees 35 minutes 89.0 feet, thence angle right 24 degrees 20 minutes 287 feet, thence angle left 15 degrees 46 minutes 165.0 feet, thence angle right 30 degrees.

12 minutes 241.2 feet; thence angle left 14 degrees 54 minutes 173.0 feet, thence angle right 15 degrees 33 minutes 115.0 feet, thence angle left 11 degrees 49 minutes 194.0 feet, thence angle right 16 degrees 7 minutes 160.0 feet to a point in the west boundary line of section 11 distant 4525 feet from the southwest corner thereof thence north along said boundary of section 11 a distance of 55.0 feet, more or less to the northerly boundary of the shore lands thence southeasterly along said boundary of shore lands lying in front of Government lots 42 and 43 to an intersection with the east boundary (produced) Section 11, thence south along the east boundary of section 11 a distance of 125 feet more or less to the point of beginning, containing an area of 7.51 acres, more or less, situated in Chelan County, State of Washington.

All that part of Government Lot 1, Section 10, Township 27 north Range 21 E. W. M., together with all shore lands of the second class situated in front of, adjacent to or abutting upon that portion of the Government Meander line lying in front of the above described property, more particularly described as follows, to-wit:

[fol. 337] Beginning at a point in the north boundary line of section 10 distant 4732.0 feet from the northwest corner thereof, thence southeasterly along a direct line making a southeasterly included angle of 55 degrees and 30 minutes a distance of 274.6 feet thence angle left 7 degrees 2 minutes 180.0 feet thence angle right 18 degrees 14 minutes 98.0 feet, thance angle left 24 degrees 27 minutes 143.9 feet thence angle left 12 degrees 55 minutes 96.0 feet, thence angle right 22 degrees 0 minutes 190.0 feet to a point in the east boundary line of section 10, thence north along said east boundary line of section 10 a distance of 55.0 feet more or less to the northerly boundary of the shore lands, thence northwesterly along the said boundary of the shore lands lying in front of Government Lot 1, to an intersection with the north boundary of section 10, thence west along said boundary of section 10 a distance of 60.0 feet more or less to the point of beginning, containing an area of 0.92 acres, more or less, situated in Chelan County, State of Washington.

All that part of Government Lot 4 Section 3 Township 27 North Range 21 E. W. M., together with all shore lands

of the second class situated in front of, adjacent to or abutting upon that portion of the Government Meander Line lying in front of the above described property, more particularly described as follows, to-wit: Beginning at a point in the south boundary line of section 3, distant 4732.0 feet, from the southeast corner thereof, thence northwesterly along a direct line making a northwesterly included angle of 55 degrees and 30 minutes with said boundary a distance of 97.0 feet, thence angle right 5 degrees 36½ minutes 187.0 feet, thence angle right 2 degrees 6 minutes 87.7 feet, thence angle left 57 degrees 0 minutes 67.6 feet, thence angle right 33 degrees 51 minutes 171.2 feet, thence angle right 0 degrees 33 minutes 72.0 feet, thence angle left 11 degrees 41 minutes 370.2 feet to a point in the west boundary line of Lot 4, Section 3 distance 653.0 feet from the southwest corner thereof, thence north along said boundary line of lot 4 a distance of 50.0 feet more or less to the northerly boundary of the shore lands, thence southeasterly along the said boundary of the shore lands lying in front of Government Lot 4 to an intersection with the south boundary of section 3, thence west along said boundary a distance of 60.0 feet, more or less, to the point of beginning, containing an area of .98 acres, more or less, situated in Chelan County, State of Washington.

All that part of Government Lots 1 and 2 and 3 of Section 3, Township 27 North, Range 21 E. W. M., together with all shore lands of the second class, situate in front of, adjacent to, or abutting upon that portion of the Government Meander line lying in front of the above described property more particularly described as follows, to-wit: Beginning at a point in the west boundary of Section 3, distant 2198.0 feet, north from the southwest corner thereof, thence in a southeasterly direction along a direct line making a southeasterly included angle of 68 degrees and 51 minutes with said boundary a distance of 308.3 feet, thence angle left 13 degrees 17 minutes 103.2 feet, thence angle right 9 degrees 45 minutes 83.3 feet, thence angle right 35 degrees 18 minutes 121.7 feet, thence angle left 29 dgrees 45 minutes 136.2 feet; thence angle left 8 degrees 15½ minutes 232.8 feet, thence angle right 17 degrees 53 minutes 185.5 feet, thence angle right 20 degrees 8 minutes 114.5 feet, thence angle left 18 degrees 42 minutes 116.8 feet,

thence angle right 13 degrees 26½ minutes 87.3 feet, thence angle left 20 degrees 15½ minutes 192.0 feet, thence angle left 25 degrees 24½ minutes 311.2 feet, thence angle left 11 degrees 50 minutes 416.1 feet, thence angle right 3 degrees 43 minutes 61.4 feet, thence angle right 33 degrees [fol. 338] 15 minutes 178 feet, thence angle right 1 degree and 29 minutes 218.3 feet thence angle right 1 degree 29 minutes 191.8 feet, thence angle right 6 degrees 42½ minutes 174.6 feet, thence angle right 29 degrees 20½ minutes 49.4 feet, thence angle left 28 degrees 44 minutes 88.4 feet; thence angle left 16 degrees 24 minutes 149.3 feet, thence angle right 4 degrees 43½ minutes 53.2 feet, thence angle right 19 degrees 8 minutes 122.4 feet, thence angle left 9 degrees 29 minutes 95.4 feet, thence angle left 6 degrees 10 minutes 133.0 feet, thence angle left 13 degrees 57 minutes 111.9 feet, thence angle right 19 degrees 24 minutes 91.5 feet, thence angle left 43 degrees 30 minutes 151.8 feet, thence angle right 11 degrees 8½ minutes 83.3 feet, thence angle right 16 degrees 36½ minutes 89.3 feet to a point in the east boundary line of Lot 3, Section 3, distant 653.0 feet from the southeast corner thereof, thence north along said boundary a distance of 50.0 feet more or less to the northerly boundary of the shore lands, thence westerly along the northerly boundary of the shore lands lying in front of Government lots 1, 2, and 3 to an intersection with the east boundary line (produced) of section 4, Township 27 North Range 21 E. W. M., thence south along said boundary of Section 4 a distance of 117.1 feet more or less to the point of beginning containing an area of 8.82 acres, more or less, situated in Chelan County State of Washington.

All that part of Government lots 5 and 6 Section 4 Township 27 North Range 21 E. W. M., togeher with all shore lands of the second class situate in front of, adjacent to or abutting upon that portion of the Government Meander line lying in front of the abovedescribed property more particularly described as follows, to-wit:

Beginning at a point in the east boundary of Section 4, Township 27 North Range 21 E. W. M., distant 2198.0 feet north from the southeast corner thereof thence northwesterly along a direct line making a northwesterly included angle of 68 degrees and 51 minutes a distance of 3.3 feet, thence angle left 5 degrees 23 minutes 208.9 feet, thence

angle right 20 degrees 44 minutes 83.3 feet, thence angle right 26 degrees 52 minutes 99.2 feet, thence angle right 21 degrees 19 minutes 134.4 feet, thence angle right 9 degrees 36 minutes 231.2 feet, thence angle left 17 degrees 31 minutes 124.7 feet, thence angle right 25 degrees 43 minutes 108.2 feet, thence angle left 25 degrees 50 minutes 129.8 feet, thence angle right 11 degrees 8½ minutes 83.3 feet, thence angle left 11 degrees 50 minutes 69.0 feet, thence angle left 30 degrees 8 minutes 176.0 feet, thence angle left 8 degrees 3 minutes 77.0 feet, thence angle right 19 degrees 50 minutes 133.8 feet, thence angle right 24 degrees 21 minutes 114.9 feet, thence angle left 21 degrees 57 minutes 144.0 feet, thence angle left 5 degrees 51 minutes 96.0 feet, thence angle right 18 degrees 37 minutes 50.1 feet to a point in the north boundary of Government Lot 5, Section 4, distant 550.2 feet from the northwest corner thereof, thence easterly along said boundary a distance of 355.0 feet more or less to the easterly boundary of the shore lands, thence southerly along the easterly boundary of the shore lands lying in front of government Lots 5 and 6 to an intersection with the easterly boundary (produced) Section 4, Township 27 North Range 21 E. W. M., thence south along said boundary of section 4 a distance of 117.1 feet, more or less to the point of beginning; containing an area of 5.92 acres, more or less, situate in Chelan County, State of Washington.

[fol. 339] It is further ordered, adjudged and decreed, that upon such payment being made by the Chelan Electric Company, that a decree shall be entered in accordance herewith releasing said Chelan Electric Company from any and all liability for any and all damages to the lands and property above described, and to any and all pumps, docks, and other property, in any manner arising from or to grow out of the impounding and storing of the waters of said Lake Chelan and the Chelan River, and raising the same to the maximum elevation of 1,100 feet, still water measurement, above mean sea level, to which judgment respondent Wick excepts and which exception is allowed.

Done in open court this 9th day of July, 1927.

W. O. Parr, Judge.

[fol. 340] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

No. 7391

CHELAN ELECTRIC COMPANY, a Corporation, Petitioner,

v.

ALICE BARBEE WICK and CHELAN COUNTY, WASHINGTON, a Municipal Corporation, Respondents

DECREE OF APPROPRIATION—Filed July 9, 1927

This cause coming on regularly for hearing, upon the application of Petitioner herein for a decree of Appropriation of the property mentioned in the petition on file herein; and it appearing to the court that heretofore a verdict was duly rendered in said cause, in favor of the Respondent Alice Barbee Wick, in the sum of $13,500 and that thereafter, to-wit, on the 9th day of July, 1927, a judgment was duly and regularly entered upon said verdict, in favor of the respondent Alice Barbee Wick, in the sum of $13,500 with interest to date and costs to be taxed; and it further appearing to the Court that said petitioner has heretofore, to-wit, on the 9th day of July, 1927, deposited with the clerk of the above entitled court, the said sum of $13,500 with interest to date of $22.50, and $298.40 taxed as costs, for the benefit of the Respondent, to be paid out under the direction of this court or the judge thereof.

Now, on motion of Charles S. Albert, and Edwin C. Matthias attorneys for said petitioner, it is hereby

Ordered, adjudged and decreed, That there is hereby appropriated and granted to, and vested in the Chelan Electric Company, a corporation, the Petitioner herein, for its corporate purposes the following described property, lands and premises situate in the County of Chelan, State of Washington, towit:

[fol. 341] The right in perpetuity to inundate and overflow, by impounding the waters of Lake Chelan and the Chelan River, and raising the same to a maximum elevation of 1100 feet still water measurement, above mean sea level, and to damage the lands herein described and all

lands of the respondent Alice Barbee Wick, lying contiguous or adjacent thereto, by wave wash, erosion, seepage, inundation or any similar cause, as a result of holding the waters to said elevation, and included in the following described real estate situate in the County of Chelan, State of Washington, particularly described as follows, to-wit:

Government lots one (1) two (2) three (3) and four (4) and the southwest quarter of the southwest quarter of Section three (3); Lots five (5) and six (6), Section four (4); Lot one (1) Section ten (10); Lot Forty-two (42) Section eleven (11); Lot forty-three (43) all in Township twenty-seven (27) North Range twenty-one (21) E. W. M., together with all shore lands of the second class situate in front of, adjacent to or abutting upon that portion of the Government Meander line lying in front of the above described property, and all littoral and riparian rights thereunto belonging or appertaining, subject to the right of the Chelan Electric Company to perpetually back and hold water upon and over the shore lands situate in front of, adjacent to or abutting upon that portion of the Government Meandor Line lying in front of Lot One (1), Section ten (10) and Lot four (4) Section three (3), Township twenty-seven (27) North Range Twenty-one (21) E. W. M. and to overflow and inundate the same to the high water mark of Lake Chelan, as granted by the order of the State Board of Land Commissioners, dated December 6th, 1909 (Application No. 7077) under and by virtue of Chapter 125, Session Laws of 1907.

The lands to be inundated and overflowed being situated in said County and State, and a metes and bounds survey description thereof being as follows:

All that part of Government Lot 43, Section 12, Township 27 North Range 21 E. W. M., together with all shore lands of the second class, situated in front of, adjacent to or abutting upon that portion of the Government Meander Line lying in front of the above described property, more particularly described as follows, to-wit: Beginning at a point in the west boundary of section 12, distant 3589.1 feet from the southwest corner thereof thence in a south-

easterly direction along a direct line making a southeasterly included angle of 87 degrees and 44 minutes with said boundary a distance of 123.6 feet, thence angle right 35 degrees 22 minutes 229.8 feet, thence angle right 4 degrees 35 minutes 173.6 feet, thence angle right 4 degrees 31 minutes 95.2 feet, thence angle right 12 degrees 45 minutes 246.2 feet, thence angle left 13 degrees 42 minutes 192.4 feet, thence angle right 5 degrees 19 minutes 121.8 feet, thence angle right 15 degrees 25 minutes 228.7 feet, [fol. 342] thence angle left 18 degrees 26 minutes 368.1 feet, thence angle left 16 degrees 42 minutes 128.5 feet, thence angle right 7 degrees 43½ minutes 122.1 feet, thence angle left 2 degrees 36 minutes 133.7 feet, thence angle right 4 degrees 10 minutes 91.1 feet, thence angle left 7 degrees 25 minutes 138.4 feet, thence angle right 4 degrees 36 minutes 143.9 feet, thence angle right 7 degrees 8 minutes 202.6 feet, thence angle left 26 degrees 11½ minutes 115.7 feet, thence angle right 25 degrees 35 minutes 105.4 feet, thence angle left 31 degrees 57 minutes 198.6 feet, thence angle right 12 degrees 51 minutes 231.2 feet, thence angle left 34 degrees 38 minutes 134.2 feet thence angle right 20 degrees 52 minutes 89.9 feet to a point in the east boundary line of Lot 43, section 12, distant 874.6 feet from the southeast corner thereof, thence north along the said boundary a distance of 168.0 feet more or less to the northerly boundary of the shore lands, thence northwesterly along said boundary of shore lands lying in front of Government Lot 43 to an intersection with west boundary of Section 12 (produced), thence south along the west boundary of Section 12 a distance of 125.0 feet more or less to the point of beginning, containing an area of 7.10 acres, more or less, situated in Chelan County, State of Washington.

All that part of Government Lots 42 and 43, Section 11 Township 27 North, Range 21 E. W. M., together with all shore lands of the second class situated in front of, adjacent to, or abutting upon that portion of the Government Meander line in front of the above described property, more particularly described as follows, to-wit: Beginning at a point in the east boundary line of Section 11, Township 27 North Range 21 E. W. M., distant 3589.1 feet from the southeast corner thereof, thence northwesterly along a di-

rect line making a northwesterly included angle of 87 degrees 44 minutes with said boundary a distance of 20.0 feet, thence angle right 20 degrees 15 minutes 96.5 feet, thence angle left 19 degrees 17 minutes 132.5 feet, thence angle left 31 degrees 12 minutes 204.8 feet, thence angle right 19 degrees 58 minutes 305.5 feet, thence angle right 24 degrees 1 minute 341.6 feet thence angle left 12 degrees 9 minutes 257.5 feet, thence angle left 4 degrees 20 minutes 580.0 feet, thence angle right 7 degrees 6 minutes 170.0 feet, thence angle left 24 degrees 5 minutes 250.0 feet, thence angle right 11 degrees 21 mniutes 182. feet, thence angle left 27 degrees 22 minutes 143.0 feet, thence angle right 23 degrees 38 minutes 300.0 feet, thence angle right 17 degrees 44 minutes 133.0 feet, thence angle right 13 degrees 55 minutes 222.0 feet, thence angle left 18 degrees 55 minutes 97.0 feet, thence angle left 14 degrees 40 minutes 103.0 feet, thence angle right 22 degrees 28 minutes 240.0 feet, thence angle right 27 degrees 53 minutes 395.0 feet, thence angle left 20 degrees 40 minutes, 78.0 feet, thence angle left 26 degrees 15 minutes 119.0 feet, thence angle right 17 degrees 35 minutes 89.0 feet, thence angle right 24 degrees 20 minutes 287.0 feet, thence angle left 15 degrees 46 minutes 165.0 feet, thence angle right 30 degrees 12 minutes 241.2 feet, thence angle left 14 degrees 54 minutes 173.0 feet, thence angle right 15 degrees 33 minutes 115.0 feet, thence angle left 11 degrees 49 minutes 194.0 feet thence angle right 16 degrees 7 minutes 160.0 feet to a point in the west boundary line of section 11, distant 4525.0 feet from the southwest corner thereof, thence north along said boundary of section 11 a distance of 55.0 feet more or less to the northerly boundary of the shore lands, thence southeasterly along said boundary of shore lands lying in front of Government lots 42 and 43 to an intersection with the east boundary (produced) Section 11, thence south along the east [fol. 343] boundary of section 11 a distance of 125.0 feet, more or less to the point of beginning, containing an area of 7.51 acres, more or less, situated in Chelan County, State of Washington.

All that part of Government Lot 1, Section 10, Township 27 North Range 21 E. W. M., together with all shore lands of the second class situated in front of, adjacent to, or abutting upon that portion of the Government Meander

line lying in front of the above described property, more particularly described as follows, to-wit: Beginning at a point in the boundary line of Section 10 distant 4732.0 feet from the northwest corner thereof, thence southeasterly along a direct line making a southeasterly included angle of 55 degrees 30 minutes a distance of 274.6 feet, thence angle left 7 degrees 2 minutes 180.0 feet, thence angle right 18 degrees 14 minutes 98.0 feet, thence angle left 24 degrees 27 minutes 143.9 feet, thence angle left 12 degrees 55 minutes 96.0 feet, thence angle right 22 degrees 0 minutes 190.0 feet to a point in the east boundary line of section 10, thence north along said east boundary of Section 10 a distance of 55.0 feet, more or less to the northerly boundary of the shore lands; thence northwesterly along the said boundary of the shore lands lying in front of Government Lot 1, to an intersection with the north boundary of Section 10; thence west along said boundary of Section 10 a distance of 60.0 feet more or less to the point of beginning; containing an area of 0.92 acres, more or less, situated in Chelan County, State of Washington.

All that part of Government Lot 4 Section 3, Township 27 North, Range 21 E. W. M., together with all shore lands of the second class situated in front of, adjacent to or abutting upon that portion of the Government Meander line lying in front of the above described property, more particularly described as follows, to-wit: Beginning at a point in the south boundary line of section 3 distant 4732.0 feet from the southeast corner thereof, thence northwesterly along a direct line making a northwesterly included angle of 55 degrees and 30 minutes with said boundary a distance of 97.0 feet, thence angle right 5 degrees 36½ minutes 187.0 feet, thence angle right 2 degrees 6 minutes 87.7 feet, thence angle left 57 degrees 0 minutes 67.6 feet, thence angle right 33 degrees 51 minutes 171.2 feet, thence angle right 0 degrees 33 minutes 72.0 feet; thence angle left 11 degrees 41 minutes 370.2 feet to a point in the west boundary line of lot 4, Section 3, distant 653.0 feet from the southwest corner thereof; thence north along said boundary line of lot 4 a distance of 50.0 feet more or less to the northerly boundary of the shore lands, thence southeasterly along the said boundary of the shore lands lying in front of Government Lot 4 to an intersection with the south boundary of Section

3, thence west along said boundary a distance of 60.0 feet more or less, to the point of beginning, containing an area of 98 acres, more or less, situated in Chelan County, State of Washington.

All that part of Government Lots 1, 2, and 3, of Section 3 Township 27 North Range 21 E. W. M., together with all shore lands of the second class, situate in front of, adjacent to or abutting upon that portion of the Government Meander line lying in front of the above described property, more particularly described as follows, to-wit: Beginning at a point in the west boundary of Section 3, distant 2198.0 feet north from the southwest corner thereof, thence in a southeasterly direction along a direct line making a south- [fol. 344] easterly included angle of 68 degrees and 51 minutes with said boundary a distance of 308.3 feet, thence angle left 13 degrees 17 minutes 103.2 feet, thence angle right 9 degrees 45 minutes 83.3 feet, thence angle right 35 degrees 18 minutes 121.7 feet, thence angle left 29 degrees 45 minutes 136.2 feet, thence angle left 8 degrees 15½ minutes 232.8 feet, thence angle right 17 degrees 53 minutes 185.5 feet, thence angle right 20 degrees 8 minutes 114.5 feet, thence angle left 18 degrees 42 minutes 116.8 feet, thence angle right 13 degrees 26½ minutes 87.3 feet, thence angle left 20 degrees 15½ minutes 192.0 feet, thence angle left 25 degrees 24½ minutes 311.2 feet, thence angle left 11 degrees 50 minutes 416.1 feet, thence angle right 30 degrees 43 minutes 61.4 feet, thence angle right 33 degrees 15 minutes 178.0 feet thence an*elg* right 1 degree 29 minutes 218.3 feet, thence angle right 1.0 degree 29 minutes 191.8 feet, thence angle right 6 degrees 42½ minutes 174.6 feet, thence angle right 29 degrees 20½ minutes 49.4 feet, thence angle left 28 degrees 44 minutes 88.4 feet, thence angle left 16 degrees 24 minutes 149.3 feet, thence angle right 4 degrees 43½ minutes 53.2 feet, thence angle right 19 degrees 8 minutes 122.4 feet, thence angle left 9 degrees 29 minutes 95.4 feet, thence angle left 6 degrees 10 minutes 133.0 feet, thence angle left 13 degrees 57 minutes 111.9 feet, thence angle right 19 degrees 24 minutes 91.5 feet, thence angle left 43 degrees 30 minutes 151.8 feet, thence angle right 22 degrees 51 minutes 114.8 feet, thence angle right 16 degrees 36½ minutes 89.3 feet, to a point in the east boundary line of Lot 3, Section 3, distant 653.0 feet from the southeast

corner thereof, thence north along said boundary a distance of 50.0 feet, more or less to the northerly boundary of the shore lands, thence westerly along the northerly boundary of the shore lands lying in front of Government Lots 1, 2, and 3, to an intersection with the east boundary line (produced) of Section 4, Township 27 North, Range 21 E. W. M., thence south along said boundary of Section 4 a distance of 117.1 feet more or less to the point of beginning; containing an area of 8.82 acres, more or less, situated in Chelan County, State of Washington.

All that part of Government Lot 5 and 6 Section 4, Township 27 North Range 21 E. W. M., together with all shore lands of the second class situate in front of, adjacent to or abutting upon that portion of the Government Meander line lying in front of the above described property more particularly described as follows, to-wit: Beginning at a point in the east boundary of Section 4, Township 27 North Range 21 E. W. M., distant 2198.0 feet north from the southeast corner thereof, thence northwesterly along a direct line making a northwesterly included angle of 68 degrees and 51 minutes a distance of 3.3 feet, thence angle left 5 degrees 23 minutes 208.9 feet, thence angle right 20 degrees 44 minutes 83.3 feet, thence angle right 26 degrees 52 minutes 99.2 feet, thence angle right 31 degrees 19 minutes 134.4 feet thence angle right 9 degrees 36 minutes 231.2 feet, thence angle left 17 degrees 31 minutes 124.7 feet, thence angle right 25 degrees 43 minutes 108.2 feet, thence angle left 25 degrees 50 minutes 129.8 feet, thence angle right 11 degrees 8½ minutes 83.3 feet, thence angle left 11 degrees 50 minutes 69.0 feet, thence angle left 30 degrees 8 minutes 176.0 feet, thence angle left 8 degrees 3 minutes 77.0 feet, thence angle right 19 degrees 50 minutes 133.8 feet, thence angle right 24 degrees 21 minutes 114.9 feet, thence angle left 21 degrees 57 minutes 144.0 feet, thence angle left 5 degrees 51 minutes 96.0 feet, thence angle right 18 degrees 37 minutes 50.1 feet, to a point in the north boundary of Government Lot 5, Section 4, distant 550.2 feet from the northwest corner thereof, thence easterly along said boundary a distance of 355.0 feet more or less [fol. 345] to the easterly boundary of the shore lands, thence southerly along the easterly boundary of the shore lands lying in front of Government Lots 5 and 6, to an intersec-

tion with the easterly boundary (produced) Section 4 Township 27 North Range 21 E. W. M., thence south along said boundary of Section 4 a distance of 117.0 feet more or less to the point of beginning; containing an area of 5.92 acres, more or less, situated in Chelan County, State of Washington.

And it is further ordered, adjudged and decreed, that the Chelan Electric Company be and it hereby is released from any and all liability for any and all damages to the lands and property above described, and to any and all pumps, docks, and other property in any manner arising from or to grow out of the impounding and storing of the waters of said Lake Chelan and the Chelan River, and raising the same to the maximum elevation of 1,100 feet still water measurement, above mean sea level, and the said Chelan Electric Company be and it is hereby granted the immediate right of possession of said property to which decree respondent Wick excepts which exception is allowed.

Done in open court this 9th day of July, 1927.

W. O. Parr, Judge.

Received copy of above decree this 9th day of July, 1927.
A. N. Corbin, Attorney for Respondent Alice Barbee Wick.

Written on back: Index I. Recorded W. Compared W. & B. Fee 5.25. Filed for record Jul. 21, P. M. 3:44, 1927. Charles S. Albert. Decree. Book 201, Page 106. Chelan County Auditor, Wenatchee, Wash. I. G.

[fol. 346] In Superior Court of Chelan County

[Title omitted]

Notice of Appeal—Filed Aug. 2, 1927

To Chelan Electric Company, a corporation, and to Chelan County, a municipal corporation, respondent; and to Messrs. Post & Russel, Charles S. Albert, Edwin C. Matthias, and J. A. Adams, their attorneys:

You and each of you will please take notice and are hereby notified that the above named respondent, Alice

Barbee Wick, appearing specially and not waiving but still retaining her special appearance and objecting to the jurisdiction of the court over her, or her property both on the ground of defective service of process or notice and on the further ground of loss of jurisdiction by reason of the respondent's Petition for Removal to the District Court of the United States, appeals to the Supreme Court of the State of Washington from the Judgment made and entered in the above entitled proceeding on the 9th day of July, 1927, and from the whole thereof and each and every part thereof.

Adrien W. Vollmer, Attorney for Respondent Wick.

Copy of above notice received and due service thereof acknowledged this 30th day of July, 1927.

Post & Russel, Charles S. Albert, Edwin C. Matthias, Attorneys for Petitioner. J. A. Adams, by S. M. D., Atty. for Respondent Chelan County.

[File endorsement omitted.]

[fol. 347] In Supreme Court of Washington, Department One, September 1, 1927

No. 20635

The State of Washington, on the Relation of Leonard J. Woodruff et al., Plaintiffs,

v.

The Superior Court for Chelan County et al., Respondents

Opinion

The Chelan Electric Company, a public service corporation, commenced a number of actions in the superior court of Chelan county to obtain the right to overflow the lands of various owners to an elevation of eleven hundred feet above mean sea level, for the purpose of creating a reservoir in Lake Chelan for the storage of water to be used

[fol. 347a] in the manufacture of electric energy for public use. By order of the trial court, sixteen cases were consolidated for the purpose of the hearing on the question of public use and necessity, but provided in the order for a separate trial of each case upon the question of damages. Upon the hearing, the court made and entered findings of fact, conclusions of law and an order of public use and necessity in the consolidated cases. Certain of the property owners, namely, Leonard J. Woodruff and wife, James P. Flick and wife, Alice Barbee Wick, Schuyler J. Gray and wife in two cases, Richard H. Lord, and Edith Merritt, have jointly obtained a writ of certiorari to review the order of the superior court. The cases relate to the enterprise that was involved in State ex rel. Chelan Electric Co. v. Superior Court, 42 Wash. Dec. 177, 253 Pac. 115, which case is commonly spoken of as the Getty case.

By their several and separate briefs and arguments, the relators here have presented assignments, some of which are common to all of the relators, others not so. They will be discussed and considered as common to all, unless specified as applying to an individual case. It is claimed that the use contemplated in this case is not a public one, because the Chelan Electric Company has no transmision line nor any customer except the Washington Water Power Company which owns practically all of the stock of the Chelan Electric Company. That situation was explained in the Getty case. The Washington Water Power Company is a public service corporation of this state and is handling the enterprise in the name of the other corporation which was organized for similar public purposes. So far as this point is concerned, there is no question about the public use to which the property will be put.

Further, it is said that the use is a private one and that there is no right or power of eminent domain, because the electric energy produced at the Lake Chelan plant will be used in Idaho. The same contention was made in the Getty case, wherein we did not find it necessary to decide whether that, if true, would defeat the right of eminent domain, because of a finding in that case to the effect that such electric energy would not be used in the state of Idaho, and said in that case that the record, as we understood it, did not lead to a different view from that of the trial court.

Admitting the record and conclusion in that case, relators [fol. 347b] now say that the proof is different in the present case, that they have now furnished additional evidence in support of their claim. But, so has the condemner introduced evidence additional to that it relied on in the other case, and upon all of it, conflicting as it is, the trial court has again found that none of the energy so produced will flow into Idaho. And again we must say, as in the Getty case, "an examination of the record does not lead to a different conclusion." The question involved is one of fact and in reaching our conclusion, as we examine and study the testimony, we bear in mind, of course, the opinion of the trial judge, who had the advantage of observing the appearance of the witnesses and their manner of testifying. This, according to our general rule.

It is assigned that the property in each case is not described with reasonable certainty and that, therefore, the trial court obtained no jurisdiction. The descriptions are long and need not be set out in this opinion. An examination of them, however, satisfies us that they are sufficient to satisfy all question of jurisdiction, as the same affects the rights of resident owners upon whom personal service was had, or the rights of any nonresident owner upon whom service was had by publication of notice. In substance, the descriptions are like the one held to be sufficient in the Getty case.

[1] In this connection, it is further claimed that the court erred in denying motions to make the petitions more definite and certain. It appears, however, that, with such motions, the relators filed motions for bills of particulars for the same purpose and that the order denying the first motions granted the second ones, which have been complied with by the petitioner by the giving of minute detailed descriptions by metes and bounds in each and all of the cases of the lands to be flooded.

[2] At least some of the lands to be flooded are traversed at the present time by a county road. The technical objection is made that no mention was made, or description of the county road given, in the descriptions furnished of relators' properties, and, as we understand some of the arguments, that the rights of the public in the county road

cannot be condemned or taken away. The county, which has supervision and control over its highways, is a party [fol. 347c] to these suits and, whether or not the highway was described in the petition in the present cases, it does clearly appear that, in another case, the petitioner is proceeding against the county to acquire its interest in the highway and that, for that purpose and upon due and regular statutory proceedings, the county agreeably is proceeding to vacate the present highway and establish another one to take its place.

[3] It is assigned that the court erred in consolidating these cases for one hearing. That matter was within the discretion of the court. The order to that effect saved to each of the relators the right to a separate trial on the question of damages.

[4] The relator Alice Barbee Wick is, and was, a resident of Philadelphia, Pennsylvania, and error is assigned on her behalf to the effect that the county of Chelan was improperly made a joint defendant with her, having the effect it is claimed of depriving her of the right to a removal of her case to the federal court on account of diverse citizenship. Two answers may be made: First, at the time the action was commenced general taxes due the county were outstanding and a lien upon the property, and Rem. Comp. Stat., § 921 [P. C. §7646], requires a petition in eminent domain cases to set forth the name of each and every owner, encumbrancer or other person or party interested in the property, and Rem. Comp. Stat., § 922 [P. C. § 7647], requires that a notice of such petition be served on each and every such person; and second, the record shows that, prior to the hearing herein by the trial court, relator Wick did remove the case against her to the federal court and, upon a hearing therein, that court promptly remanded the cause to the state court, from which order of the federal court it appears no appeal was prosecuted nor review sought or had.

[5] Another assignment of error on behalf of Miss Wick is that due process of law is not afforded nonresident land owners by § 2, Laws of 1890, p. 295; Rem. Comp. Stat., § 922. That section provides:

"A notice, stating briefly the objects of the petition, and containing a description of the land, real estate, premises or property sought to be appropriated, and stating the time and place when and where the same will be presented to the court, or the judge thereof, shall be served. * * * In all cases where the owner or person claiming an interest [fol. 347d] in such real or other property, is a nonresident of this state, or where the residence of such owner or person is unknown, and an affidavit of the agent or attorney of the corporation shall be filed that such owner or person is a nonresident of this state, or that after diligent inquiry, his residence is unknown, or cannot be ascertained by such deponent, service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks; * * *"

The return day, or the day fixed for the hearing in this case, was October 11, 1926. The notice of the hearing, which was filed on September 22, 1926, so stated. It was published September 23, September 30 and October 7, 1926, three weekly publications with eighteen days between the date of the first publication and the return day. On October 8, 1926, three days before the return day, Miss Wick by her attorney, who was also a resident of Philadelphia, Pennsylvania, by special appearance (which has been preserved) filed a motion to quash the notice and service. Other than the matter of the description of the property, hereinbefore discussed, the argument is that the two weeks' publication of notice provided for by statute is unreasonably short to constitute due process of law. A great number of authorities are cited by each side upon this important point. They have been examined, but we do not find it necessary or practical to cite or discuss all of them. Counsel for the relator has called attention to authorities deciding the number of publications and intervening time necessary to satisfy a statute requiring publication for a given number of successive weeks. But that is not the question here where, under the statute requiring publication once a week for two successive weeks, the fact is that notice was so published for three successive weeks. The real question here is that of reasonable notice to a non-

resident and opportunity to be heard. The case nearest in point cited, quoted from and apparently relied on by this relator, is Roller v. Holly, 176 U. S. 398, 44 Law Ed. 520. In that case, it was held that a nonresident defendant who was called upon to answer a suit pending in Texas, while he himself was in Virginia, within five days of date of service of citation, was not furnished due process of law. That is, the time under the circumstances was unreasonably short. But we may, and of course do, agree with that [fol. 347e] case and still it does not lead to the striking down of our statute that is complained of, nor to a holding that the notice in the present case was ureasonably short. Counsel argues, as we understand, that, because our statute speaks of two weekly publications, it means eight days' notice and that that length of time, under the circumstances in this case, does not furnish due process of law under the doctrine of the Roller case. That case speaks of the date of service with relation to the return day. Our statute says nothing whatever about a return day, but only the number of publications of the notice, where publication must be had. The return day not being regulated by statute, as was the case in Roller v. Holly, supra, it is fixed independently of it, so that the question in this case is, was the eighteen days' notice that was actually given, that is, the time that elapsed from the date of the first publication of the notice and the return day, unreasonably short under the provision of the constitution?

The statute provides for publication in a newspaper in the county where the lands are situated. With reference to the validity and the necessity for indirect notice of proceedings in rem, as applied to lands in proceedings seeking to subject them to public necessity, there is a sensible and practical theory, supported by authority, that the test is whether the publication of notice was such as to create a reasonable presumption that, if the owner is present and taking care of his property, he would receive notice of what is going on and have an opportunity to defend. Ballard v. Hunter, 204 U. S. 241, 51 Law Ed. 461; Bellingham Bay Improvement Co. v. City of New Whatcom, 172 U. S. 314, 43 Law Ed. 460; Huling v. Kaw Valley R. & Imp. Co., 130 U. S. 559; Windsor v. McVeigh, 93 U. S. 274, 23 Law

Ed. 914; Great Northern R. Co. v. City of Minneapolis, 136 Minn. 1, 161 N. W. 231.

As stated by counsel for the respondent, notwithstanding the contention of relator that eighteen days was not enough time, it happened that the relator did employ a lawyer residing in Philadelphia to come out and put in an appearance for her, doing so three days before the return day, and then, by the liberal, if not slow, process supervised and controlled by the trial court, had more than five months to prepare her defense before the hearing actually took place. [fols. 347f & 347½] As said in 2 Laws Eminent Domain (3rd ed.), § 568, p. 1102, in respect to the manner or time of posting or publishing notice in order to satisfy the requirements of the constitution, "no definite rule is laid down by the authorities." In our opinion, the statute in question is a valid one, and the notice in this case did provide and give reasonable time and opportunity to be heard.

Affirmed.

Mitchell, J.

Mackintosh, C. J., Main, French, and Fullerton, JJ., concur.

[fol. 348] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER DENYING REHEARING—Filed Oct. 13, 1927

The court having considered the petition of the relator Alice Barbee Wick for a rehearing herein;

It is ordered that the said petition be and it hereby is denied.

Dated this 13th day of October, 1927.

By the Court:

Mackintosh, Chief Justice.

[File endorsement omitted.]

[fol. 348½] In Supreme Court of Washington

No. 21274

Chelan Electric Co., Respondent,

vs.

Alice Barbee Wick, Appellant; Chelan County, Defendant

Judgment—Sept. 4, 1928

This cause having been heretofore submitted to the Court upon the transcript of the record of the Superior Court of Chelan County and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, it is now, on this 4th day of September, A. D. 1928, on motion of Post & Russell, Chas. S. Albert & E. C. Matthias, of counsel for respondent, considered, adjudged and decreed that the judgment of the said Superior Court be, and the same is hereby, affirmed, with costs, and that the said Chelan Electric Co. have and recover of and from the said Alice Barbee Wick the costs of this action, taxed and allowed at one hundred & sixty-eight & 75/100 dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the said Superior Court for further proceedings in accordance herewith.

[fols. 349-398] In Supreme Court of Washington

No. 20635

State ex Rel. Leonard J. Woodruff et al., Relators,

vs.

Superior Court of Chelan Co. & Chelan Electric Co., Respondents

Judgment—Oct. 13, 1927

This cause having been heretofore submitted to the Court upon the transcript of the record of the Superior Court of

Chelan County and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, it is now, on this 13th day of October, A. D. 1927, on motion of Post & Russell, Chas. S. Albert, & Edwin C. Matthias, of counsel for respondents, considered, adjudged and decreed that the judgment of the said Superior Court be, and the same is hereby, affirmed, with costs, the petition for rehearing denied, and that the said Chelan Electric Co. have and recover of and from the said Leonard J. Woodruff et ux., James P. Flick et ux., Alice Barbee Wick et al., Schuyler J. Gray et ux., & Edith Merritt et al., the costs of this action, taxed and allowed at seventy-three & 15/100 dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the said Superior Court for further proceedings in accordance herewith.

—— ——, Clerk of the Supreme Court, State of Washington.

[fol. 399] IN SUPREME COURT OF WASHINGTON

No. 21274

CHELAN ELECTRIC COMPANY, a Corporation, Respondent,

vs.

ALICE BARBEE WICK, Appellant; CHELAN COUNTY, WASHINGTON, a Municipal Corporation, Respondent Below

ASSIGNMENT OF ERRORS FOR ALICE BARBEE WICK

Now comes Alice Barbee Wick, appellant above-named, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Washington, in the above-entitled cause, there are manifest errors, to the great injury of the said petitioner, Alice Barbee Wick, in the following particulars, to-wit:

I

The Supreme Court of the State of Washington erred in refusing to hold that the Petition and published Notice of

Condemnation in the Superior Court of Chelan County did not contain a sufficient description of the part of the land to be taken, nor the extent of the title sought, and thereby failed to comply with the Fourteenth Amendment of the Constitution of the United States.

II

The Supreme Court of the State of Washington erred in refusing to hold that the Superior Court of Chelan County erred in refusing appellant's motion "to vacate, quash and set aside pretended notice of filing and of hearing" of the petition in condemnation; said motion being upon the [fol. 400] ground, inter alia, that the Condemnation Statutes of the State of Washington, upon which condemnation was based, particularly that portion thereof (Session Laws 1890, p. 295, sec. 2, Remington's Comp. Stat. 922) relating to notice and service upon non-resident owners is inadequate as to manner and time, preventing removal to a federal court, and is thus and otherwise contrary to Paragraph 1, Section 2, of Article III of the Constitution of the United States and the Fourteenth Amendment thereto.

III

The Supreme Court of the State of Washington erred in refusing to hold that the Superior Court of Chelan County erred in refusing appellant's motion to have the Petition set forth more clearly by metes and bounds the land to be overflowed or affected, and the title thereto, or to furnish a bill of particulars, setting out said information, said motion being made on the express ground that such information was necessary to show, and would have shown, a case removable to the federal court, whereby she was deprived of her right of removal, contrary to Paragraph 1, Section 2, Article III of the Constitution of the United States, and also of her rights secured by Section 1 of the Fourteenth Amendment to said Constitution.

IV

The Supreme Court of the State of Washington erred in refusing to hold that the Superior Court of Chelan County

erred in holding that said County was a necessary party to the condemnation proceedings against appellant, because said County had a lien for taxes assessed and levied but not yet due and payable, and erred in refusing appellant's petition for removal to the federal court, contrary to Section 2, Article III of the Constitution of the United States.

V

The Supreme Court of the State of Washington erred in [fol. 401] holding that Chelan County was a proper party respondent, thereby depriving appellant of her right of removal to the federal court.

VI

The Supreme Court of the State of Washington erred in holding that the Revenue (tax) Laws of the State of Washington, particularly Acts approved Mar. 15, 1893, Chap. cxxiv, p. 323, etc. particularly sec. 79 p. 358, sec. 88 p. 361; March 23, 1895, Chap. clxxvi p. 508, etc. particularly sec. 19 p. 516, sec. 21 p. 520; March 15, 1897, Chap. lxxi p. 136 etc. particularly sec. 78, p. 174, sec. 83 p. 176; March 9, 1903, Chap. 59 p. 73, particularly sec. 3, p. 74; providing that taxes assessed and levied but not yet payable are a lien on the real estate on which they are assessed and levied before the time they are allowed to be paid, or could be paid, are not in conflict with Article III, Section 2, paragraph 1, of the Constitution of the United States.

VII

The Supreme Court of the State of Washington erred in refusing to hold the following Statutes of the State of Washington void, as depriving appellant of due process of law secured by the Fourteenth Amendment of the Constitution of the United States, to-wit: Acts approved March 13, 1899, Chap. 94, p. 147 particularly sec. 1, p. 147; March 17, 1903, Chap. 173, p. 360, particularly sec. 2, p. 362; March 15, 1907, Chap. 159, p. 349, particularly sec. 1, p. 349.

VIII

The Supreme Court of the State of Washington erred in refusing to hold that certain Eminent Domain Statutes

of the State of Washington, approved as follows: February 1, 1886, Chap. xxx p. 58, etc. particularly sec. 2, amended by act approved March 21, 1890, (Chap. IX—Corporations) p. 294, etc., entitled "Appropriation of Lands by Corporations—To regulate proceedings for;" February 25, 1891, Chap. xlvi p. 84, etc.; February 19, 1895, Chap. xlvii p. 80, etc.; March 9, 1897, Chap. xlvi, p. 63, etc.; March 15, 1907, Chap. 159, p. 349 etc.; February 8, 1927, Chap. 88, p. 68, [fol. 402] etc.; March 7, 1927 (Laws 1927) Chap. 202 p. 290 etc.; March 19, 1927, (Laws 1927) Chap. 219 p. 337 etc., are contrary to Section 2, Article III, and Section 2, Article VI, and the Fourteenth Amendment of the Constitution of the United States.

IX

The Supreme Court of the State of Washington erred in refusing to hold that the Chelan Electric Company was attempting to condemn for a private use and not for a public use, contrary to appellant's rights under the Fourteenth Amendment of the Constitution of the United States.

X

The Supreme Court of the State of Washington erred in refusing to hold that the Superior Court of Chelan County erred in entering an order of consolidation of several condemnation suits against different property owners, whereby appellant was denied the right to remove her cause to the federal court, in accordance with Article III Section 2, of the Constitution of the United States.

XI

The Supreme Court of the State of Washington erred in not holding that by the proceeding of condemnation the appellant was improperly deprived of her right to have the cause removed to a federal court.

XII

The Supreme Court of the State of Washington erred in refusing to find that the Superior Court of Chelan County had erred in permitting the Chelan Electric Company to

file its Bill of Particulars after the motion for a bill of particulars had been denied, and after the Order of Public Use and Necessity had been entered.

XIII

The Supreme Court of the State of Washington erred in confirming the judgment or decree of the Superior Court of Chelan County because the extent of the land condemned [fol. 403] was in excess of that authorized by the Federal Power Commission.

XIV

The Supreme Court of the State of Washington erred in refusing to hold that the Superior Court of Chelan County erred in instructing the jury that the petitioner in condemnation was seeking only an easement in the land, whereas the Petition and Notice set out that full title is to be acquired; and in instructing the jury that appellant "will retain all rights and privileges incident to the ownership of real property not inconsistent with the right of the petitioner."

XV

The Supreme Court of the State of Washington erred in refusing to find that the Instructions granted by the Superior Court of Chelan County were argumentative and conflicting, and in refusing to hold that the said Superior Court should have granted the Instructions prayed by appellant.

XVI

The Supreme Court of the State of Washington erred in refusing to hold that the judgment, order of public use and necessity and decree of appropriation entered by the Superior Court of Chelan County containing different descriptions of the property taken than that contained in the published Notice and Petition, deprived the appellant of due process of law, secured by the Fourteenth Amendment of the Constitution of the United States.

XVII

The Supreme Court of the State of Washington erred in not holding that the decree of appropriation, permitting

the condemnor to enter into possession pending an appeal, was in violation of the rights of appellant, under Section 2, of Article III of the Constitution of the United States and under the Fifth and Fourteenth Amendments thereto.

[fol. 404] XVII

The Supreme Court of the State of Washington erred in affirming the judgment of the Superior Court of Chelan County.

For which errors, the appellant, Alice Barbee Wick, prays that the judgment of the Supreme Court of the State of Washington, dated September Fourth, 1928, in the above-entitled cause be reversed, and a judgment rendered in favor of the said appellant, and for costs.

Alice Barbee Wick, Alice Barbee Wick, per A. W. V. Adrien Winston Vollmer, Adrien Winston Vollmer, Attorney for Petitioner Alice Barbee Wick.

[fol. 405] In Supreme Court of Washington

No. 21274

[Title omitted]

Order Allowing Appeal

Upon consideration of the annexed Petition for Appeal to the Supreme Court of the United States, of Alice Barbee Wick, unmarried, and upon examination of the Petition and record, and desiring to give said petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter, and it appearing that all other persons or parties who might have an interest in the same have been duly notified of the intention to apply for the allowance of said appeal, and have failed or refused to join in the same,

It is hereby ordered, That for the purpose of prosecuting an appeal to the Supreme Court of the United States from the final judgment and decree made and entered in the above-entitled cause, the above-named Alice Barbee Wick

be and she hereby is granted a severance from all other persons or parties whatsoever who may have been joined with her in any part of the proceedings had in the above-entitled cause.

And, because in the record, proceedings and judgment in the highest court of this State in which a decision in the case could be had between the Chelan Electric Company, a [fols. 406-410] corporation, respondent, and Alice Barbee Wick, appellant, and Chelan County, Washington, a municipal corporation, respondent below, and wherein was drawn in question the validity of a statute of a state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of its validity, it appears that the said Alice Barbee Wick is entitled to have the judgment reviewed by the Supreme Court of the United States, and has presented a Petition for Appeal and an Assignment of Errors to that end.

It is further ordered, That the Petition for Appeal be and the same hereby is allowed, and that a certified transcript of the record, proceedings and judgment aforesaid, with all things concerning the same be transmitted to the Supreme Court of the United States at Washington, in the District of Columbia, within sixty (60) days from the date hereof, so that the said Supreme Court may examine and consider the same and may cause further to be done to correct the errors therein, if any hath occurred, what of right and according to the laws and customs of the United States should be done.

And it is further ordered, That a bond on appeal be fixed in the sum of five hundred dollars ($500.00), conditioned as the law directs.

Dated Olympia, Washington, this 8th day of October, A. D. 1928.

Mark A. Fullerton, Chief Justice of the State of Washington.

[fols. 411-417] Bond on appeal for $500.00, approved and filed October 20, 1928, omitted in printing.

[fol. 418] PETITIONER'S EXHIBIT 27

I, O. C. Merrill, Executive Secretary of the Federal Power Commission, do hereby certify that the following is a true and correct copy from the record of the proceedings of the Commission in my custody of that portion of the minutes of the seventy-eighth meeting of the Commission, held on the 26th day of March, 1926; which refers to the action of the Commission on the Application of the Chelan Electric Company for a license (project No. 637):

"In the matter of the application of Chelan Electric Company of Seattle, Washington, (project No. 637), for a license for a power project on Chelan River and on lands of the United States partly within the Chelan National Forest, in Chelan County, Washington; said company having submitted satisfactory evidence of its compliance with the laws of the State of Washington, as required by Section 9, subdivision (b) of the Federal water power act and of its ability to carry out its plans; notice of said application having been given and published as required by Section 4 of said act, full opportunity having been given for all interested parties to be heard, and no application for said project or in conflict therewith having been filed by any state or municipality; and the maps, plans and specifications of the proposed projects works having been approved by the commission; the Commission thereupon found that said project will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of water-power development and of other beneficial public uses, and that the license will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired, and in pursuance of such finding authorized issuance of license for a period of fifty (50) years, subject to the provisions of said act, to the rules and regulations of the Commission pursuant thereto, and to the following special conditions, and to such further conditions, if any, as the Secretary of Agriculture shall deem necessary for the adequate protection and utilization of said Chelan Na-

[fol. 419] tional Forest;

"(a) That the license shall at no time cause or permit the elevation of the surface of Chelan Lake to be raised above

elevation 1,100 or to be drawn below elevation 1,079 feet; and unless otherwise specifically authorized by the Commission the draft of water from said lake by the licensee shall not exceed in any year an average of 1,000 cubic feet per second during the period April 1 to August 15 unless or until the surface of said lake is at or above 1,096, and such draft shall during the period August 16 to September 15 of every year be limited to an amount which will not cause the elevation of the surface of said lake to be drawn below elevation 1092; provided,

That if any year under the restrictions herein named the surface of said lake does not reach elevation 1096 by August 1, said date shall apply in lieu of August 16 as determining the beginning of the period during which the surface of the lake may be drawn down to elevation 1092. Said elevations are in feet above mean sea level, as determined by reference to the United States Geological Survey bench mark, elevation 1091.182, as now located and established on Johnson's Point, near Lakeside, Chelan County, or such other bench mark as may be established by the United States Geological Survey having the same datum. Licensee shall establish such additional bench marks as appear necessary in the judgment of the Commission, or its authorized representative, to permit accurate and convenient determination of said elevation.

"(b) That the amount to be entered upon the fixed capital accounts of said project and reported to the Commission as representing the actual legitimate cost thereof and the actual legitimate investment therein up to the date of the license, whether consisting of expenditures actually made, of charges accrued, or of liabilities or obligations incurred, [fol. 420] shall be determined by the Commission in accordance with the provisions of the act and of the regulations established thereunder.

"It was further voted that the Commission declares it to be its purpose to exercise jurisdiction over any securities hereafter issued or assumed by the licensee to the extent authorized under the provisions of section 19 and/or 20 of the act; and the licensee shall not hereafter sell, pledge, repledge, or otherwise dispose of any of its own securities or assume any obligations or liability as guarantor, endorser,

surety or otherwise, in respect of the securities of any other person, natural or artificial, unless and until authorized by the Commission so to do."

Witness my hand and the seal of the Federal Power Commission at Washington, D. C., this 9th day of April, 1926.

O. C. Merrill, Executive Secretary. (Seal.)

[fol. 421] THE FEDERAL POWER COMMISSION

License on Government Lands

Project No. 637

Washington

Chelan Electric Company

Whereas, by Act of Congress, Approved June 10, 1920 (41 Stat., 1063) designated therein as "The Federal Water Power Act" and hereinafter called "The Act," the Federal Power Commission, hereinafter called "The Commission," is authorized and empowered, inter alia, to issue licenses for the purpose of constructing operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development, transmission and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States (including the Territories) or for the purpose of utilizing the surplus water or water power from any Government dam; and

Whereas, Chelan Electric Company, hereinafter called "The Licensee," a corporation organized and existing under the laws of the State of Washington and having its offices and principal place of business in the City of Seattle, in the State of Washington, has made application in due and proper form to the Commission for a license for a power project designated as Project No. 637 on the records of the Commission, and for authority to construct, maintain and operate, at Chelan Lake, in the vicinity of Wenatchee, in the County of Chelan, State of Washington, certain project works, as hereinafter described, necessary or convenient

[fol. 422] for the development, transmission and utilization of power, and to occupy and use therefor certain lands of the United States, as hereinafter described together with all riparian rights appurtenant thereto which are necessary or useful for the purpose of the project; and

Whereas, the Licensee has submitted to the Commission satisfactory evidence of its compliance with the laws of the State of Washington as required by Section 9 subsection (b) of the Act, and the Commission is satisfied as to the ability of the licensee to carry out the plans for said project as filed with said application; and

Whereas, notice of said application has been given and published by the Commission, as required by section 4 of the Act, full opportunity has been given to all interested parties to be heard, and no application for said project, or in conflict therewith, has been filed by any State or municipality; and

Whereas, the maps, plans and specifications of said project and of said project works as hereinafter described, have been approved by the Commission, and the Commission has found that said project, as hereinafter described, will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of waterpower development and of other beneficial public uses, and that the license will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired; and

Whereas, the Licensee, on the 17th day of April, 1926, pursuant to an authorization of its board of directors, a copy of the record thereof being hereto attached, accepted in writing all the terms and conditions of the Act and of this license;

[fol. 423] Now, therefore, the Commission hereby issues this license to the Licensee for the purpose of constructing, operating and maintaining upon the lands of the United States hereinafter designated and described, certain project works necessary or convenient for the development, transmission and utilization of power and constituting a part of the project hereinafter described, and of authorizing in connection with and as a part of said project the occupancy and/or use by the licensee of said lands of the United States and of all riparian rights appurtenant thereto which are

necessary or useful for the purposes of the project; said license, including the period thereof, being subject to all the terms and conditions of the Act and of the rules and regulations of the Commission pursuant thereto as amended and made effective on the 1st day of April, 1924, as though fully set forth herein, which said rules and regulations are attached hereto and made a part hereof, and being subject also to the following express conditions and limitations, to-wit:

Article 1. This license is issued for a period of fifty (50) years from the date hereof, and in consideration of such license and the benefits and advantages accruing thereunder to the Licensee it is expressly agreed by the Licensee that the entire project, project area and project works as hereinafter designated and described, whether or not upon lands of the United States, shall be subject to all the terms and conditions of this license including the terms and conditions of the Act and of the rules and regulations of the Commission pursuant thereto and made a part of this license.

Article 2. The project covered by and subject to this license is located in part upon lands of the United States within the Chelan National Forest and consists of—

[fol. 424] A. All lands constituting the project area and inclosed, or the location of which is shown, by the project boundary, and/or interests in such lands necessary or useful for the purposes of the project, whether such lands or interests therein are owned or held by the Licensee or by the United States; such project area and project boundary being shown approximately by certain exhibits which accompanied said application for license and which are designated and described as follows:

Exhibit "K" (in 39 sheets). Each sheet entitled "Chelan project, Map of Project Area" and signed by L. C. Gilman, President, on August 20, 1925.

Exhibit "L" Supplemental Sheet No. 10, entitled "Chelan Project Location & Profile of Conduit Lines," Signed by L. C. Gilman, President.

and which will be more fully and definitely shown and described by field notes and maps to be filed as hereinafter provided.

B. All water rights, reference to which is made in certain exhibits which accompanied said application for license and which are designated and described as follows:

Exhibit "D" (in 15 typewritten sheets). Statement that the Applicant has complied with the requirements of the laws of the states, counties and municipalities with regard to property and franchises.

Exhibit "E" (in 2 typewritten sheets). Statement regarding water rights obtained from the State of Washington.

C. All project works consisting of a dam and head gates in River at the outlet of Lake Chelan; two conduits, principally tunnel, leading from the dam to a power house located near the confluence of Chelan and Columbia Rivers, the location, nature and character of which projects works are more fully shown and described by certain exhibits which accompanied said application for license and which are designated and described as follows:

Exhibit "L" (in 8 sheets). All signed by L. C. Gilman, President, on August 20, 1925, the titles to which are:
[fol. 425] Sheet 1. "Chelan Project Diversion and Control Dam."

Sheet 2. "Chelan Project Conduit Line No. 1—River Crossing."

Sheet 3. "Chelan Project Conduit Line No. 2—River Crossing."

Sheet 4. "Chelan Project Surge Tank, Penstock & Power House—Plan and Elevation."

Sheet 5. "Chelan Project Power House—Front Elevation."

Sheet 6. "Chelan Project Power House—End Elevation and Cross Section."

Sheet 7. "Chelan Project Power House—Section Plan."

Sheet 8. "Chelan Project Switching Station—Plan and Elevation.

Exhibit "L." Supplemental Sheet No. 9, entitled "Chelan Project Diversion & Control Dam Location" signed by L. C. Gilman, President.

Exhibit "M" (in 9 typewritten sheets). General Description and Specifications of equipment.

D. All other structures, fixtures, equipment, or facilities used or useful in the maintenance and operation of the project, whether owned by the Licensee or by the United States, and located upon the project area, including such portable property as may be used and useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as a part of the project works is approved or acquiesced in by the Commission; also all other rights, easements or interests, including said riparian rights, the ownership, use, occupancy or possession of which is necessary or appropriate in the maintenance and operation of the project or appurtenant to the project area.

Article 3. The maps, plans, specifications and statements designated and described in Article 2 hereof as Exhibits D, E, K, L and M, respectively and approved by the Executive Secretary for the Commission in accordance with its authorization of March 26, 1926, are hereby made a part of [fol. 426] this license, and no substantial change shall hereafter be made in said exhibits, or any of them, until such change shall have been approved by the Commission; Provided, however, that if the Licensee deems it necessary or desirable that said approved maps, plans, specifications and statements, or any of them, be changed there shall be submitted to the Commission for approval amended, supplemental or additional maps, plans, specifications and statements covering the proposed changes, and upon approval by the Commission of such proposed changes such amended, supplemental or additional maps, plans, specifications and statements shall become a part of this license and shall supersede, in whole or in part, such map, plan, specification or statement, or part thereof, theretofore made a part of this license as may be specified respectively, in the order or endorsement or approval.

Article 4. Said project works shall be constructed in substantial conformity with the approved maps, plans and specifications thereof made a part of this license and designated and described in Articles 2 and 3 hereof or as changed in accordance with the provisions of said Article 3. Ex-

cept when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project work constructed under this license without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission shall direct. Minor changes in or divergencies from such approved maps, plans, and specifications may be made in the course of construction, if such changes will not result in decrease in efficiency, in material increase in cost, or in impairment of the general scheme of development; but any such minor changes made without the prior approval of the Commission which in its judgment have produced or will produce any of such results shall be subject to such alteration as the Commission may direct.

[fol. 427] Article 5. The work of construction under this license, whether or not conducted upon lands of the United States, shall be subject to the inspection and approval of the District Forester, U. S. Forest service, Portland, Oregon, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall notify such representative of the date upon which work will begin, and as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of construction for a period of more than one week, and of its resumption and completion.

Article 6. Subject to the provisions of Section 13 of the Act, the Licensee shall begin the construction of the project works on or before November 1, 1926, shall complete such thereof as are necessary for the generation and delivery of 25,000 H. P. of electric energy on or before November 1, 1928, and shall complete the entire project on or before December 31, 1934.

Article 7. Upon the completion of the project works, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised maps, plans, specifications, and statements, in so far as necessary to show any divergence from or variation in

the project area as finally located or in the project works as constructed when compared with the area shown and the works designated or described in this license or in the maps, plans, specifications and statements approved by the Commission under the provisions of Article 3 hereof, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variations in or divergence from the approved maps, plans, specifications and statements. Such revised maps, plans, specifications, and statements shall, if and when approved by the Commission, be made a part of this license and shall, to the extent and in the particulars set forth in the order [fol. 428] or endorsement of approval, be substituted for the maps, plans, specifications and statements theretofore approved by the Commission under the provisions of Article 3 hereof. The maps finally approved by the Commission and made a part of this license under the provisions of Article 3 and/or 7 hereof shall show the project area to an adequate scale and the boundary thereof either by legal subdivisions, by metes and bounds survey, and by uniform offsets from center-line survey. Said project area shall include all lands without respect to ownership and whether or not the exact boundaries can be definitely fixed and determined, the use and occupancy of which are or will be valuable or serviceable in the maintenance and operation of the project; on which are located or to which are appurtenent the project works (other than portable property) and the rights, easements, or interests likewise valuable and serviceable; and the ownership or possession, or the right of use and occupancy, of which are subject to acquisition by the United States under the provisions of Section 14 of the Act. Said maps shall show the ownership of each parcel of land in said project area, and with respect to each parcel to which the licensee has not the fee title, the character of the right of use and occupancy possessed by the Licensee together with the term of such right.

Article 8. For the purpose of determining the stage and flow of the stream or streams from which water is to be diverted for the operation of said project works and of the amount of water held in and drawn from storage, the Licensee shall install and thereafter maintain a standard gage or gages as may be necessary to determine and record

the variations of the level of Chelan Lake, and the rates and volume of the discharge of water therefrom, and shall provide for the required readings of such gages and for the adequate rating of the station or stations. The Licensee shall also install and maintain standard meters adequate for the determination of the amount of electric energy generated by said project works. The number, character, and location of gages, meters or other measuring devices, and the method of operation thereof may be [fol. 429] altered from time to time if necessary to secure adequate determinations, but such alterations shall not be made except with the approval of the Commission or its authorized representative or upon the specific direction of the Commission. The installation of gages, the ratings of said stream or streams, and the determination of the flow thereof, shall be under the supervision of the District Engineer of the U. S. Geological Survey having charge of stream gaging operations in the region of said project, and the Licensee shall reimburse the said United States Geological Survey for costs incurred in such supervision or for such part thereof as said District Engineer may deem equitable in the circumstances. The Licensee shall keep accurate and sufficient record of the foregoing determination to the satisfaction of the Commission, shall make return of such records annually, at such time and in such form as the Commission may prescribe.

Article 9. The Licensee shall be liable for all damages occasioned to the property of others by the construction, maintenance or operation of said project works, or of the works appurtenant or necessary thereto, and in no event shall the United States be liable therefor.

Article 10. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto constructed under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 11. Timber upon lands of the United States to be used or destroyed in the construction of the project works, shall be paid for in accordance with the requirements and estimates of the Department concerned.

[fol. 430] Article 12. In the construction and maintenance of the project works herein specified, the Licensee shall place and maintain suitable structures to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling and obstructing traffic and endangering life on highways, streets or railroads.

Article 13. The Licensee shall at no time cause or permit the elevation of the surface of Chelan Lake to be raised above elevation 1100 or to be drawn below elevation 1079 feet; and unless otherwise specifically authorized by the Commission the draft of water from said lake by the Licensee shall not exceed in any year an average rate of 1000 cubic feet per second during the period April 1 to August 15, unless or until the surface of said lake is at or above elevation 1096, and such draft shall during the period August 16 to September 15 of every year be limited to an amount which will not cause the elevation of the surface of said lake to be drawn below elevation 1092; provided, That if in any year under the restrictions herein named the surface of said lake does not reach elevation 1096 by August 1, said date shall apply in lieu of August 16 as determining the beginning of the period during which the surface of the lake may be drawn down to elevation 1092. Said elevations are in feet above mean sea level, as determined by reference to the United States Geological Survey bench mark, elevation 1091.182, as now located and established on Johnson's Point, near Lakeside, Chelan County, or such other bench marks as may be established by the U. S. Geological Survey having the same datum. Licensee shall establish such additional bench marks as appear necessary in the judgment of the Commission, or [fol. 431] its authorized representative, to permit accurate and convenient determination of said elevation.

Article 14. The Licensee shall clear and keep clear the shores of Chelan Lake to elevation 1100, shall remove to the satisfaction of the Commission or of its authorized representative, all trees, snags, stumps, brush, fallen trees or other debris and all temporary structures, and shall make such disposition of the material removed as the Commission or its authorized representative may direct.

Article 15. It is understood and agreed that the use and occupancy of government lands hereby authorized is limited to that necessary or convenient for the development of power, and that public use of Chelan Lake and its shores for recreational or navigation purposes, in so far as such use will not unreasonably interfere with the development of power, shall not be restricted.

Article 16. In the interests of navigation, the Licensee shall mark or buoy all rocks to be submerged which, in the judgment of the Commission would be hazardous to boats navigating the waters of Chelan Lake, and shall reconstruct or replace any existing pier, dock, or other landing facility as may be necessary to permit its use at all stages of said lake, unless the owner of such pier, dock, or other landing facility shall have been otherwise compensated for any damage done thereto by the alteration of the levels of said lake under the provisions of this license.

Article 17. The Licensee shall, before placing any transmission line into operation, make provision satisfactory to the Commission for avoiding inductive interference between such transmission line and any existing telephone line or lines of the United States, or with any such line or lines for which location has been made and specifications prepared but upon which construction has not begun at the time of the erection of said transmission line. Such provisions may be applied either to the transmission line or to the telephone line or both, as may be determined upon the basis of least cost. The Licensee hereby agrees to assent to such changes in the location or design of any of [fol. 432] its transmission lines as may in the opinion of the Commission be necessary or desirable in order to avoid inductive interference with any telephone line or lines of the United States hereafter constructed or proposed to be constructed, provided such changes are made at the expense of the United States.

Article 18. The Licensee shall permit the use of said Chelan Lake for the temporary storage or for the transportation of logs, ties, poles, lumber, or other forest products, and upon demand of the Secretary of Agriculture, shall construct a logway or logways approved by said Secretary and suitable for the passage of such logs, ties, poles, lumber or other forest products, over or around the dam at the outlet of said Lake without undue hindrance or delay; Provided, That the use of such logway or logways by owners of such logs, ties, poles, lumber, or other forest products, shall be under such rules and regulations adopted by the Licensee as may be approved by the Secretary of Agriculture.

Article 19. The Licensee will interpose no objections to, and will in no way prevent, the use of water for domestic purposes by persons or corporations occupying lands of the United States under permit along or near any stream or body of water, natural or artificial, used by the Licensee, in the operation of the project works covered by this license.

Article 20. The Licensee shall allow officers and employees of the United States free and unrestricted access in, through and across the said project and project works in the performance of their official duties, and shall allow the Forest Service, without charge, to construct or permit to be constructed in, through or across the said project, railroads, chutes, roads, trails, conduits, and other means of transportation not inconsistent with the enjoyment of said project by the Licensee for the purposes herein set forth.

Article 21. The Licensee shall do everything reasonably within its power and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon [fol. 433] request of officers of the Forest Service, or other agents of the United States, to prevent and suppress fires on or near the lands to be occupied under this license.

Article 22. The Licensee hereby agrees as a condition of this license that the amount to be entered upon the fixed capital accounts of said project and reported to the Commission as representing the actual legitimate cost thereof and the actual legitimate investment therein up to the date of this license, whether consisting of expenditures actually

made, of charges accrued, or of liabilities or obligations incurred, shall be determined by the Commission in accordance with the provisions of the Act and of the regulations established thereunder; and it is further agreed by the Licensee that upon completion of the construction of each of the separable parts of said project for which dates of completion are specified in Article 6 hereof or any addition to or betterment of said project the Licensee shall file with the Commission a statement, under oath in duplicate, in such detail as the Commission may require, showing the actual legitimate cost of construction thereof, together with the price paid for water rights, rights of way, lands or interest in lands constituting any part of the project property subject to the provisions of this license, all as specified in regulation 20, section 2, of said rules and regulations. Such statement or statements shall include all proper and legitimate costs, whether incurred prior to the date of this license or on and after such date; and the Licensee shall, if requested by the Commission, show separately on such statement or statements the items and amounts of cost incurred prior to the issuance of this license as determined by the Commission as hereinbefore in this article provided, with such other details with respect to the cost of the project or any part thereof as the Commission may require. Each and every item of cost included in such statement shall be supported by proper voucher or [fol. 434] other record; and any such voucher or record or certified copy thereof, in support of any item properly includible in said cost shall become a part of the permanent records of said project and shall be kept and retained by the Licensee in the manner required by the Commission.

Article 23. Whenever the Licensee is directly benefitted by the construction work of another Licensee, a permittee, or of the United States of a storage reservoir or other head water improvement, the Licensee shall reimburse the owner of such reservoir or other improvement for such part of the annual charges for interest, maintenance and depreciation thereon as the Commission may deem equitable. The proportion of such charges to, be paid by the Licensee shall be determined from time to time by the Commission. Whenever such reservoir or other improvement is constructed by

the United States the Licensee shall pay similar charges into the Treasury of the United States upon bills rendered by the Commission.

Article 24. The Licensee shall pay to the United States reasonable annual charges for the purpose of reimbursing the United States for the costs of administration of the Act and for recompensing it for the use, occupancy and enjoyment of its lands or other property hereinbefore described. The payment by the Licensee of such annual charges for any calendar year shall be made to the United States at the end of the year, or within thirty days thereafter, upon bills rendered or approved by the Commission. Such charges shall be determined in accordance with the provisions of Regulation 14 of said rules and regulations of the Commission, and for the purposes of such determination the power capacity shal be taken as 54,000 horse power.

Article 25. After the first twenty years of operation of said project under this license, out of surplus earned thereafter, if any, accumulated in excess of a specified reason-[fol. 435] able rate of return upon the actual, legitimate investment of the Licensee in said project, all as defined in and determined by the provisions of Regulation 17 of said rules and regulations of the Commission, the Licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return shall, subject to the proviso of Paragraph A, Section 3 of said regulation, be one and one-half (1½) times the weighted average annual interest rate payable on the par value of the bona fide interest-bearing debt of the Licensee actually outstanding, in whole or in part, on account of project property at the beginning of the period of amortization and of each calendar year thereafter; such weighted average annual interest rate being determined as provided in Paragraphs B and C of Section 3 of said Regulations 17; Provided, That if at the beginning of the period of amortization or of any calendar year thereafter, the outstanding interest-bearing debt of the Licensee on account of the project or projects under license, together with any other works or property operated in connection therewith,

is less than 25 per cent of the actual, legitimate investment of the Licensee in said project or projects, then and in such event for the calendar year next following the specified rate of return shall be two (2) times the legal rate of interest in the state in which the project or major part thereof is located.

Subject to the provisions of Section 6 of said regulation, the following proportions of such surplus earnings shall be paid into and held in such amortization reserves: Of all surplus earnings up to and including 2 per cent upon the actual, legitimate investment, 30 per cent thereof shall be so paid; of all surplus earnings in excess of 2 per cent and not in excess of 4 per cent upon such investment, 50 per cent thereof shall be so paid; of all surplus earnings in [fol. 436] excess of 4 per cent and not in excess of 6 per cent, 70 per cent thereof shall be so paid, and of all surplus earnings in excess of 6 per cent, 90 per cent thereof shall be so paid; Provided, that if at the end of any calendar year of the amortization period the Commission shall find that the accumulated earnings of the License during the period of operation, including the first twenty (20) years theerof, have not yielded a fair return upon the actual, legitimate investment in the project or projects under license, the proportion of such surplus earnings for such calendar year and for succeeding calendar years to be paid into such amortization reserves shall be ten (10) per cent thereof until such time as the accumulated earnings of the Licensee represent, in the judgment of the Commission, a fair return upon such investment for such period of operation.

Article 26. No lease of said project or part thereof whereby the lessee is granted the exclusive occupancy, possession or use of project works for purposes of generating, transmitting or distributing power shall be made without the prior written approval of the Commission; and the Commission may, if in its judgment the situation warrants, require that all the conditions of this license, of the Act, and of said rules and regulations of the Commission shall be applicable to such lessee and to such property so leased to the same extent as if the lessee were the Licensee hereunder; Provided, that the provisions of this article shall not apply to parts of the project or project works which

may be used by another jointly with the Licensee under a contract or agreement whereby the Licensee retains the occupancy, possession and control of the property so used and receives adequate consideration for such joint use, or to leases of land while not required for the purposes of generating, transmitting, or distributing power, or to buildings or other property not built or used for said purposes, or to minor parts of the project or project works the leasing of which will not interfere with the usefulness or efficient operation of the project by the Licensee for said purposes.

[fol. 437] Articles 27. It is hereby understood and agreed that the Licensee, its successors and assigns will, during the period of this license, retain the possession of all project property covered by this license as issued or as hereafter amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and that none of such properties valuable and serviceable to the project and to the development, transmission, and distribution of power therefrom will be voluntarily sold, transferred, abandoned or otherwise disposed of without the approval of the Commission; Provided, That a mortgage or trust deed or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article. The Licensee further agrees, on behalf of itself, its successors and assigns, that, in the event said project is taken over by the United States upon the termination of this license, as provided in Section 14 of the Act, or is transferred to a new Licensee under the provisions of Section 15 of the Act, it will be responsible for and will make good any defect of title to or right of user in any such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and discharge or will assume responsibility for payment and discharge of all liens or incumbrances upon said project or project property created by said Licensee or created or incurred after the issuance of this license; Provided, that the provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacement thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear, or to

require the Licensee for the purpose of transferring the project to the United States or to a new Licensee to acquire any different title or right of user in any such project property than was necessary to acquire for its own purposes as Licensee.

[fol. 438] Articles 28. The Licensee shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged; and in case of the development, transmission, distribution, sale or use of power in public service by the Licensee or by its customers engaged in public service within a state which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by the Licensee or by its customers engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of this license that jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control. The Commission hereby declares it to be its purposes to exercise the jurisdiction over any securities hereafter issued or assumed by the Licensee to the extent authorized under the provisions of Sections 19 and/or 20 of the Act; and the Licensee shall not hereafter sell, pledge, repledge, or otherwise dispose of any of its own securities or assume any obligations or liability as guarantor, endorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, unless and until authorized by the Commission so to do; Provided, That the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this Article as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

[fol. 439] Article 29. With the written consent of the Licensee, the Commission may by order made under its

seal, and after the public notice required by Section 6 of the Act, modify, alter, enlarge or omit, in so far as authorized by law, any one or more of the conditions or provisions of this license.

Article 30. The enumeration of any rights reserved to the United States or to any state or municipality under the Act, or of any requirement of the Act or of said rules and regulations of the Commission shall not be construed in any degree as impairing any other rights so reserved by the Act or as limiting the force of any other requirement of said Act or of said regulations.

In witness whereof the Federal Power Commission has caused its name and seal to be hereunto signed and affixed by its Executive Secretary, O. C. Merrill, this 8th day of May, 1926.

Federal Power Commission. (Signed) O. C. Merrill, Executive Secretary. (Seal Federal Power Commission, U. S. A.)

[fols. 440-444] In testimony of acceptance of all the terms and conditions of the Federal Water Power Act of June 10, 1920, and of the further conditions imposed in the foregoing license, the Licensee, this 17th day of April, 1926, has caused its name and corporate seal to be hereto signed and affixed by L. C. Gilman and Thomas Balmer, its President and Asst. Secy., pursuant to a resolution of its board of directors, passed on the 17th day of April, 1926, a certified copy of the record thereof being hereto attached.

Chelan Electric Company, by (Signed) L. C. Gilman, President.

Attest: (Signed) Thomas Balmer, Asst. Secretary.

[fol. 445] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

OBJECTION TO REMOVAL—Filed June 27, 1927

Comes now the above named respondent, Chelan County, Washington, a municipal corporation, and objects to the

removal of the above entitled action to the District Court of the United States in and for the Eastern District, Northern Division, and states to the Court:

1. That the said United States District Court has no jurisdiction over this controversy nor the parties hereto.

2. That the petition for removal presented at this time to this court was not filed in this court within the time limited by law.

3. That the controversy herein is not one wholly between citizens of different states.

4. That said controversy is not a separable controversy.

5. That no notice of hearing upon the petition for removal has been served upon Chelan County.

6. That said Chelan County is a lienor and encumbrancer upon and has a right, title, interest and estate in the lands, real estate and premises owned by the said Alice Barbee Wick, and sought to be taken in these proceedings.

7. That such Chelan County is specially interested in these proceedings and in the property sought to be taken herein, by reason of the proceedings heretofore taken with reference to said property, and shown by Exhibits 18 and 19 in this action.

8. Upon the ground that the taxes for the year 1926 on [fol. 446] Lots 1, 2, 3, and 4, in Section 3, Township 27 were paid by the Respondent Alice Barbee Wick on March 12, 1927, and the taxes on the property involved in this proceeding in Sections 10 and 11 in Township 27 were also paid on March 12, 1927, and that the time for removing said cause has long since expired.

J. A. Adams, Attorney for Chelan County, Washington.

[fol. 447] IN SUPERIOR COURT OF CHELAN COUNTY

No. 7391

CHELAN ELECTRIC COMPANY, a Corporation, Petitioner,

vs.

ALICE BARBEE WICK and CHELAN COUNTY, WASHINGTON, a Municipal Corporation, Respondents

DOCKET ENTRIES

Sep. 17,	'26.	Notice, 4.00.
" "	"	Petition.
" 22,	"	Sheriff's return.
" "	"	Aff. of Service.
" "	"	" for Publication.
Oct. 4.	'26.	Notice of appearance (County).
" 8,	"	Special appearance and motion to quash 2.00.
" 11,	"	Order for Continuance.
" 30,	"	Aff. of Publication.
" 30,	"	Notice of Petition & Bond for removal.
" "	"	Petition for Removal to the District Court of the United States.
" "	"	Bond on Removal.
" "	"	Affidavit.
" "	"	Objections to removal to the United States Court.
" "	"	Order.
" "	"	Proposed order of removal.
Nov. 4,	"	Motion to Remand.
" "	"	Affidavits and order.
" "	"	Order for Continuance.
Dec. 6,	"	Order for Continuance.
Feb. 7,	'27.	Order for Continuance.
" 28,	"	Notice.
" "	"	Special appearance and demurrer & Motion to make more definite and certain.
" "	"	Order.

Mar. 1, 1927. Order overruling demurrer.
" " " Order overruling Motion.
" 24, " Notice of Presentation of Order, etc.
" " " Findings and Conclusions.
" " " Order of Public Use & Necessity & Order of Consolidation.
" 24, " Respondent's proposed findings.
" 26, " Notice.
" " " Jury demand, 12.00.
" 28, " Order on Motions to make more definite and certain & for Bill of Particulars.
" " " Exceptions to findings, Conclusions and order of Public use, etc.
Mar. 29, " Exceptions to Findings, Conclusions & Order.
" 30, " Respondent's Proposed Findings (Consolidated cases).
" " " Exceptions to Refusal of Court to sign Proposed Findings & Conclusions (Consolidated).
Apr. 15, " Note of issue.
" " " Aff. of Service.
" 27, " Bill of Particulars.
" 30, " Writ of Certiorari received today.
May 16, " Statement of facts (Filed in #7389) (5-28-27).
[fol. 448]
May 27, '27. Supplemental Transcript (Filed in 7389) (5-28-27).
" " " Statements of Facts (5-28-27).
June 27, 1927. Petition for removal.
" " " Bond on Removal.
" " " Objections to Removal.
" " " Affidavit of Adrien W. Vollmer.
June " " Proposed Order.
" " " Order denying Pet. for Removal.
" 30, " Request for Instructions. (Filed after all had rested.)
" " " Instructions to the Jury.
June 30, 1927. Notice of Presentation.
" " " Judgment on Verdict (Proposed).
" " " Verdict & Ans. to Interrogatories.

July 2, 1927. Motion for New Trial.
" " " Exceptions to Instructions, etc.
" " " Notice.
" " " Notice.
" " " Supporting Affidavit on Motion for New Trial.
" " " Additional Exceptions to Instructions.
" 8, " Cost Bill of Wick.
" 9, " Order striking Aff. of Adrien W. Vollmer, & Denying Motion for New Trial.
" 9, " Judgment on Verdict.
" " " Decree of Appropriation.
July 30, " Notice of appeal.
Aug. 2, " Notice of appeal.
Sep. 1, '27. Transcript on appeal.

[fol. 449-452] The Docket Entries Since Sep. 1, 1927

Sep. 1, 1927. Transcript on appeal.
Oct. 8, " Statement of Facts.
" 17, " Proposed Amendments to Statement of Facts.
" 18, " Remittitur.
Nov. 22, " Notice of Attorney's Lien.
Feb. 15, 1928. Notice.
" 15, " Affidavit of Service.
" 18, " Præcive for Alice B. Wick.
" 20, " Motion for Settlement and Certificate.
" 20, " Objections to Settlement.
" 20, " Order extending time for filing briefs.
" 24, " Letter of Request.
" 24, " Affidavit of Charles S. Albert.
" 25, " Affidavit of John B. Shorett & W. G. McLaren.
Mar. 1, " Affidavit of Service.
" 1, " Decision of Judge Parr.
" 5, " Affidavit.
" 5, " Affidavit of Service.
" 5, " Notice.
" 8, " Exhibits, Transcript & Statement of Facts sent to Supreme Court.

Mar. 14, " Supplemental transcript filed.
" 21, " Appellant's Briefs, Abstract of Record and Supplemental Transcript sent to Supreme Court.
" 30, " Affidavit of Service.
Apr. 5, " Supplemental Transcript sent to Supreme Court.
" 7, " Amended notice of Attorney's Lien.
" 19, " Briefs Received from Mr. Albert and sent to Supreme Court. Supplemental Transcript also sent.
" 20, " The Original Resp. Briefs received from Mr. Albert and sent to Supreme Court.

[fol. 453] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

OBJECTION TO REMOVAL—Filed June 27, 1927

Comes now the above named respondent, Chelan County, Washington, a municipal corporation, and objects to the removal of the above entitled action to the District Court of the United States in and for the Eastern District of Washington, Northern Division, and states to the court.

1. That the said United States District Court has no jurisdiction over this controversy nor the parties hereto.

2. That the petition for removal presented at this time to this court was not filed in this court within the time limited by law.

3. That the controversy herein is not now wholly between citizens of different states.

4. That said controversy is not a separable controversy.

5. That no notice of hearing upon the petition for removal has been served upon Chelan County.

6. That said Chelan County is a lienor and encumbrancer upon and has a right, title, interest and estate in the lands,

real estate and premises owned by the said Alice Barbee Wick, and sought to be taken in these proceedings.

7. That such Chelan County is specially interested in these proceedings and in the property sought to be taken herein, by reason of the proceedings heretofore taken with reference to said property, and shown by Exhibits 18 and 19 in this action.

[fol. 454] 8. Upon the ground that the taxes for the year 1926 on Lots 1, 2, 3, and 4, Section 3, Township 27 were paid by the Respondent Alice Barbee Wick on March 12, 1927, and the taxes on the property involved in this proceeding in Section 10 and 11 in Township 27 were also paid on March 12, 1927, and that the time for removing said cause has long since expired.

J. A. Adams, Attorney for Chelan County, Washington.

[fol. 455] In Superior Court of Chelan County

[Title omitted]

Notice of Withdrawal of Attorney—Filed Feb. 28, 1927

To the above-named petitioner and to its attorneys, Messrs. Post & Russell, Charles S. Albert, and Edwin C. Matthias:

You are hereby notified that D. C. Conover, one of the attorneys of record for the respondent Alice Barbee Wick, appearing specially herein, has withdrawn as attorney in said case, and Adrien W. Vollmer, the other attorney, will continue to act as such.

D. C. Conover, Adrien W. Vollmer.

Copy of the foregoing notice of withdrawal received and service accepted this 18th day of February, 1927.

Post & Russell, Charles S. Albert, Edwin C. Matthias.

[File endorsement omitted.]

[fols. 456-512] IN SUPREME COURT OF WASHINGTON

No. 21274

[Title omitted]

NOTE RE ORDER STRIKING STATEMENT OF FACTS

(For Order of the Supreme Court of Washington striking the Statement of Facts see Opinion of Supreme Court.)

[File endorsement omitted]

[fol. 513] **Addition to Transcript of Record**—Filed in U. S. Supreme Court Feb. 9, 1929

IN SUPERIOR COURT OF CHELAN COUNTY

No. 7391

CHELAN ELECTRIC COMPANY, a Corporation, Petitioner,

vs.

ALICE BARBEE WICK and CHELAN COUNTY, WASHINGTON, a Municipal Corporation, Respondents

SPECIAL APPEARANCE AND MOTION TO QUASH—Filed Oct. 8, 1926

Comes now the above-named respondent Alice Barbee Wick, appearing herein specially for the purpose of this motion only, and objects to the jurisdiction of this court over the person of this respondent and moves the court to vacate, quash and set aside the pretended notice of filing and of hearing of the petition of the above-named petitioner as pretended to be served upon this respondent, for the following reasons and upon the following grounds, to-wit:

1. That the said pretended notice was and is illegally and irregularly issued.

2. That the said pretended notice is not such as prescribed by law.

3. That the said pretended notice has not been served or returned as provided by law.

4. That the statutes of the State of Washington upon which the above-entitled proceeding is based do not provide for sufficient or adequate service of notice in such cases upon nonresident owners of property affected.

5. That said statutes do not provide either for personal service of such notice upon non-residents of the State of Washington or the mailing of a copy of such notice to non-residents as a pre-requisite to the right of publication.

6. That the aforesaid pretended notice in the above-entitled action does not comply in form or substance with the statutes of this state governing these proceedings, and does not constitute due notice.

7. That the effect of the service of the notice provided by the statutes of the State of Washington in this and similar proceedings against interested parties or property owners not residing within the State of Washington, and especially upon those residing in distant states, is to permit the property or property rights of such non-resident owners to be confiscated and taken without due process of law.

8. That the act or statute of the State of Washington upon which the above-entitled proceedings is based, and more particularly that part of said act or statute providing for the notice and the service thereof by publication upon non-resident owners or interested parties is contrary to the constitution of the State of Washington and is therefore unconstitutional and void.

[fol. 514] 9. That the act or statute of the State of Washington upon which the above entitled proceeding is based, and more particularly that part of said act or statute providing for the notice and the service thereof by publication upon non-resident owners or interested parties is contrary to the constitution of the United States and is therefore unconstitutional and void.

10. That the court has no jurisdiction over the person of this respondent.

This motion is based upon the records and files in the above pretended action, and also upon the affidavit of Adrien W. Vollmer hereto attached.

Comes now the above-named respondent, Alice Barbee Wick, appearing herein specially for the purpose of this motion only, and objects to the jurisdiction of this court over the person of this respondent, and further moves the court to vacate, set aside and quash the pretended service of the notice of filing and hearing of petitioners' petition upon this respondent, for the following reasons and upon the following grounds, to-wit:

1. That the said pretended notice was and is illegally and irregularly issued.

2. That the said pretended notice is not such as prescribed by law.

3. That the said pretended notice has not been served or returned as provided by law.

4. That the statutes of the State of Washington upon which the above-entitled proceeding is based do not provide for sufficient or adequate service of notice in such cases upon non-resident owners of property affected.

5. That said statutes do not provide either for personal service of such notice upon non-residents of the State of Washington or the mailing of a copy of such notice to non-residents as a pre-requitite to the right of publication.

6. That the aforesaid pretended notice in the above-entitled action does not comply either in form or substance with the statutes of this state governing these proceedings, and does not constitute due notice.

7. That the effect of the service of the notice provided by the statutes of the State of Washington in this and similar proceedings against interested parties or property owners not residing within the State of Washington, and especially upon those residing in distant states, is to permit the property or property rights of such non-resident owners to be confiscated and taken without due process of law.

8. That the act or statute of the State of Washington upon which the above-entitled proceeding is based, and more particularly that part of said act or statute providing for the notice and the service thereof by publication

upon non-resident owners or interested parties is contrary to the constitution of the State of Washington and is therefore unconstitutional and void.

9. That the act or statute of the State of Washington upon which the above-entitled proceeding is based, and more particularly that part of said act or statute providing for the notice and the service thereof by publication upon non-resident owners or interested parties is contrary to the constitution of the United States, and is therefore uncon-
[fol. 515] stitutional and void.

10. That the court has no jurisdiction over the person of this respondent.

This motion is based upon the records and files in the above pretended action and upon the affidavit of Adrien W. Vollmer hereto attached.

(Signed) D. C. Conover, Adrien W. Vollmer, Attorneys for respondent Alice Barbee Wick, appearing specially. Office and P. O. address: 1489 Dexter Horton Bldg., Seattle, Washington.

Service accepted and copy received this 8th day of Oct. 1926.

E. C. Matthias, Attorney for Petitioner.

[fol. 516] In Superior Court of Chelan County

Affidavit of Adrien W. Vollmer

State of Washington,
County of Chelan, ss:

Adrien W. Vollmer, being first duly sworn, on oath deposes and says: That he is a resident of the City of Philadelphia, in the State of Pennsylvania, and is a nephew of the above-named respondent, Alice Barbee Wick; that the said Alice Barbee Wick is not a resident of the State of Washington and never has been a resident of the State of Washington, and has not been within the State of Washington for many years last past, and during all of such time has lived in and resided and made her home in the

said City of Philadelphia in the State of Pennsylvania, and at and for some time prior to the filing of the petition in the above-entitled action and the pretended service of the notice of hearing thereof by publication, the agents for the said petitioner knew the address of the said respondent; that the said respondent has never received any notice of the hearing of the above-entitled matter and has not been served with notice of the hearing thereon excepting by the pretended and alleged service by publication of the pretended notice of hearing in the above entitled matter; that this affidavit is made upon the special appearance of the above-named respondent Alice Barbee Wick and in support of her motion to quash the pretended notice and the pretended or alleged service thereof, and for that purpose this affiant specially appears herein on behalf of the said respondent for the purpose of making this affidavit and for no other purpose.

Adrien W. Vollmer.

Subscribed and sworn to before me this October 8th, 1926. Martin H. Easton, Notary Public in and for the State of Washington, residing at Wenatchee. Commission expires June 15, 1927. (N. P. Seal.)

[fol. 517] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

Consolidated

RESPONDENTS' PROPOSED FINDINGS OF FACT—Filed Mar. 24, 1927

Come now the respondents Leonard J. Woodruff and Jane Doe Woodruff, his wife, James P. Flick and Grace M. Flick, his wife, and Alice Barbee Wick, and propose the following Findings of Fact to be inserted in page three (3) of the Petitioner's proposed Findings of Fact at line six (6) from the bottom of said page:

Thereupon the respondents, Leonard J. Woodruff, and Jane Doe Woodruff, his wife, James P. Flick and Grace M. Flick his wife, and Alice Barbee Wick, moved the court for separate hearings upon the question of public use and necessity, which motions were by the court severally denied and the exceptions of the said severally moving respondents thereto duly noted, whereupon the court ordered that, without waiving the special appearance for the proposed hearing and determination of the questions of public use and necessity and of any appeal or writ of certiorari for the review of the order of this court upon those questions, all of the above numbered causes may be consolidated and treated as one cause, and decided by one order, and that if the question of damages in said causes should hereafter be tried there should be a separate trial and a separate verdict in each of said causes in all respects as though said causes had never been consolidated for any purpose; and thereupon evidence was introduced by the petitioner in support of the allegations of its petitions and by the respondents in opposition thereto, and the court having duly heard and considered the evidence and the arguments of counsel, and being fully advised in the premises, makes the following:

Conclusions of Law

Come now the respondents, Leonard J. Woodruff and [fol. 518] Jane Doe Woodruff, his wife, James P. Flick and Grace M. Flick, his wife, appearing herein by their attorneys, Shorts & Denney, Wm. A. Grimshaw and O. P. Barrows; and the respondents Alice Barbee Wick, appearing by her attorneys Adrien W. Vollmer, Peters & Powell and Robert H. Evans; and the respondent Katheryne V. Cowen appearing by her attorneys, W. B. Stratton and S. J. Chadwick; and the respondents Schuyler J. Gray and Dora Gray, his wife, by their attorneys Shorts & Denney, Wm. A. Grimshaw and O. P. Barrows; and the respondent, Etheldia Burge, appearing by her attorneys Shorts & Denney, Wm. A. Grimshaw and O. P. Barrows; and the respondent Richard H. Lord appearing by his attorneys Shorts & Denney, Wm. A. Grimshaw and O. P. Barrows; and proposes Conclusions of law herein as follows:

I

That the public interest does not require the prosecution of the enterprise of the petitioner, and that the land, real estate premises and other property sought to be appropriated in the respective causes are not required and not necessary for the purpose of said enterprise.

Without waiving the foregoing proposed Conclusion of Law, but in the event the same be denied and in the event the conclusions of law proposed by the petitioner be made and adopted by the court, the said respondents, without approving or asking that such petitioner's proposed Conclusions of Law be adopted, do move the court that such conclusions of law, if made, be amended to read as follows:

I

"That the public interest requires the prosecution of the enterprise of the petitioner for use only within the State of Washington."

II

"And that the land, real estate, premises and other property sought to be appropriated in the respective causes are [fol. 519] necessary for the purpose of the said enterprise for use only within the State of Washington.

III

The said respondents object to paragraph 2 of the proposed order and decree of the necessity of public use submitted by the petitioner and to the whole thereof, and each and every part thereof, and without waiving such objection, but in the event such objection be overruled by the court and that the said paragraph 2 of the petitioner's proposed order and decree of public use and necessity be adopted by the court, the said respondents move the court to insert in such proposed paragraph 2 the following:

a. In the first line thereof after the words "That the contemplated use" insert "only within the State of Washington," and in the thirteenth line thereof, after the words

"for its corporate purposes" insert "for use only within the State of Washington."

O. P. Barrows, Shorts & Denney, Wm. A. Grimshaw, Adrien W. Vollmer, Peters & Powell and Robert H. Evans, W. B. Stratton and S. J. Chadwick, Attorneys for said Respondents.

Service accepted and copy received this 23rd day of March, 1927.

Post & Russell, Charles S. Albert, E. C. Matthias, Attorneys for Petitioner.

[fol.520] [File endorsement omitted]

IN SUPERIOR COURT OF CHELAN COUNTY

[Title omitted]

Consolidated

RESPONDENTS' PROPOSED FINDINGS OF FACT—Filed Mar. 30, 1927

Comes now the respondent, Alice Barbee Wick, in cause No. 7391, appearing specially by her attorneys Peters & Powell, Robert H. Evans and Adrien W. Vollmer, pursuant to permission heretofore granted by the above entitled court, files further and supplemental Findings of Fact and Conclusions of Law:

I

That the said respondent, Alice Barbee Wick is alleged by petitioner to have been served only by publication and that said service was inadequate and insufficient, and not in the manner prescribed by law and that the court had no jurisdiction of the said respondent, Alice Barbee Wick, and of the subject matter of this suit.

II

That the Chelan Electric Company is not a public service corporation.

[fol. 521] III

That the object and purposes for which the petitioner in said cause was incorporated was not for public service.

IV

That under and by virtue of the permits recited in the petitioner's petition, the said petitioner has no right to use the waters of the said Lake Chelan and the Chelan River for the purpose of overflowing and inundating the lands of the respondents, Alice Barbee Wick, as described in said petition for the purposes mentioned in said petition, and that petitioner is not a public service corporation.

V

That part of the lands in the above entitled cause against Alice Barbee Wick, proposed to be overflowed and inundated by the petitioner is a public road or highway used for motor and other traffic not mentioned or described in said petition and that said petitioner has no right to overflow and inundate the same.

VI

That the petitioner proposes to raise the waters of Lake Chelan to a still water elevation of 1100 feet above mean sea level and that in doing so it will necessarily damage, overflow and inundate the respondent's lands above the said 1100 foot level by action of the waves, sudden freshets and other causes, and that in so doing it will violate the license from the Federal Power Commission recited by the petitioner under which the petitioner alleges it has a permit to raise the waters of Lake Chelan "to the maximum elevation of 1100 feet mean sea level."

That said permit permits the raising of the Lake for the generation of power for use only within the State of Washington as will appear by reference to the terms of said permit.

VII

[fol 522] That the Washington Water Power Company is not a party of record to the above recited cause but that the

Chelan Electric Company, the petitioner proposes to sell all of its power to said Washington Water Power Company to be used by said Company in the State of Washington and elsewhere in the United States and in the province of British Columbia and elsewhere in the Dominion of Canada, and that said Washington Water Power Company is under contract to furnish said power for interstate and intrastate purposes and commerce.

VIII

That when the power from the Chelan project is commingled with power generated from other projects both within and without the State of Washington it is impossible to segregate it or identify it.

IX

That the chief purpose of the Chelan project is to convert said Lake Chelan into a storage reservoir to take care of a shortage of power outside the State of Washington in low water season and that the amount of power generated by any plant when calculated merely in kilowatt hours produced, is no indication of its proportionate capacity to supply current during low water season.

X

That it is not necessary for the petitioner to convert Lake Chelan into a storage reservoir for the purpose of supplying any shortage in the State of Washington, as there are innumerable power sites on the Columbia River and elsewhere in the said State, available for said purpose, the development of which would improve navigation without marring one of the greatest scenic and thus economic assets of the State of Washington.

XI

That the entire output of the petitioner will not be devoted to public use, but will be sold to one customer, the Washington Water Power Company, and by it to be used for public and private purposes.

[fol. 523] XII

That sufficient power can be generated to supply the requirements of the petitioner without raising the waters of Lake Chelan above high water level of about 1085 feet above mean sea level.

XIII

That the court has no method of knowing that the Washington Water Power Company intends to, and will, conduct its electric light and power business in the future as in the past.

XIV

That the respondent, Alice Barbee Wick owns all of the shore land described in the Petitioner's petition, and that all of said shore land, excepting as stated in Petitioner's petition, was acquired prior to petitioner's alleged right to overflow and inundate certain of the shore lands of Lake Chelan up to the ordinary high water mark of 1085 feet above mean sea level.

Presented and refused this 3/30/27.

W. O. Parr, Judge.

From the foregoing Facts found the Court concludes in law as follows:

Proposed Conclusions of Law

I

That the public interest does not require the prosecution of the enterprise of the petitioner, and that the lands, real estate, premises and other property of the said respondent, Alice Barbee Wick, sought to be appropriated is not required and necessary for the purpose of said enterprise within the State of Washington.

II

That the said proposed taking of the property of the respondent Alice Barbee Wick, is without adequate and

sufficient notice and is the taking of private property for a private use and is otherwise contrary to the Constitution and Laws of the State of Washington and the United States.

III

[fol. 524] That the petitioner, having failed to personally notify the respondent, Alice Barbee Wick, and having failed to adequately describe in said petition, publication and notice, and otherwise the premises proposed to be taken, the court has obtained no jurisdiction over the person or property of the petitioner, Alice Barbee Wick.

IV

That the proposed flooding or inundating of the lands of the non-resident respondent, Alice Barbee Wick, by erosion, wave action, freshets, or otherwise, is not within the scope of the petition, notice and publication in said cause and therefore constitutes an unlawful attempt to deprive said respondent of her property without due process of law and is otherwise an unlawful attempt to take her property contrary to the Constitution and Laws of the State of Washington and the United States.

V

That said petition, notice and publication in the proceedings against the respondent, Alice Barbee Wick, are defective in that they fail to state whether a title in fee simple or an easement is proposed to be taken.

VI

That the proceedings in the said cause against said Alice Barbee Wick are defective in that the petitioner proposes to condemn a superior use for an inferior use as a county road crosses said premises.

VII

That the proposed taking of private property within the State of Washington for the purpose of supplying energy

without the State of Washington, is not for a public use and necessity.

VIII

That a substantial portion of the purposes for which the petitioner proposes to use the power generated at the Chelan [fol. 525] project is not for a public use and necessity.

Presented and refused this 3/30/27.

W. O. Parr, Judge.

[fol. 526] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 20635

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed April 29, 1927

The above entitled matter coming before the court this 29th day of April, 1927, pursuant to petition or affidavit for writ of certiorari and order to show cause, heretofore issued by the court, and counsel for the respective parties having appeared; counsel for the Relator having specially appeared,

It is ordered that a writ of certiorari issue herein, returnable on June 2, 1927; that said writ shall not require any stay of proceedings in the superior court in any of the causes referred to in said petition for writ of certiorari, and shall not prevent the superior court for Chelan County from setting either, any or all of said causes for trial and trying the same, as though the said writ had not been issued, all within its discretion, it not being intended hereby to direct the trial court as to its conduct in relation to the trial of said causes; that said writ shall be in the usual form, except that it shall provide that the relators shall not be required to prepare or serve any abstract, and neither party shall be required to print any briefs, but that said briefs may be typewritten; that the relators'

brief, together with their statement of facts, shall be served upon the respondents on or before May 16, 1927, and the respondents' brief shall be served on the relators within ten days thereafter.

Done in open court this 29th day of April, 1927.

Kenneth Mackintosh, Chief Justice of Supreme Court of the State of Washington.

[fol. 527] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 21274

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Nov. 19, 1928

To the Clerk of the above-entitled Court:

Will you please prepare a transcript of the following record in Cause 20635, and in the above-entitled cause, duly certified, for the use of the Supreme Court of the United States, on appeal, in this cause:

The following from "Transcript of Record" filed in this cause (Cause 7391 Superior Court of Chelan County):

Paper	Date of filing in superior court
1. Notice	Sept. 17, 1926.
2. Petition	Sept. 17, 1926.
3. Affidavit of service on Chelan County	Sept. 17, 1926.
4. Sheriff's return on non-resident	Sept. 22, 1926.
5. Affidavit for Publication	Sept. 22, 1926.
6. Notice of appearance, Chelan County	Oct. 4, 1926.
7. Special Appearance and Motion to Quash with affidavit of Adrien W. Vollmer attached	Oct. 8, 1926.
8. Order for Continuance	Oct. 17, 1926.
[fol. 528] 9. Affidavit for Publication	Oct. 30, 1926.

Paper		Date of filing in superior court
10.	Notice of Petition and Bond for Removal	Oct. 30, 1926.
11.	Petition for Removal to U. S. District Court	Oct. 30, 1926.
12.	Bond on Removal	Oct. 30, 1926.
13.	Affidavit of D. C. Conover	Oct. 30, 1926.
14.	Objections to Removal	Oct. 30, 1926.
15.	Proposed order of Removal	Oct. 30, 1926.
16.	Order on Removal	Oct. 30, 1926.

		Date of filing in U. S. district ct.
17.	Motion to Remand	Nov. 1, 1926.
18.	Notice of Removal	Nov. 1, 1926.
19.	Affidavit of Edwin C. Matthias in support of Motion to Remand, Sworn to Oct. 29, 1926	Nov. 1, 1926.
20.	Order to Show Cause	Nov. 1, 1926.
21.	Affidavit of Service of Motion, Order and Notice of Remand	Nov. 2, 1926.
22.	Affidavit of A. M. Anderson in support of Motion to Remand	Nov. 3, 1926.
23.	Affidavit of R. A. Scheble	Nov. 3, 1926.
24.	Affidavit of J. A. Adams	Nov. 3, 1926.
25.	Order of Remand	Nov. 3, 1926.

Paper		Date of filing in superior court
26.	Order of Continuance	Nov. 4, 1926.
27.	Order for Continuance	Dec. 6, 1926.
28.	Order for Continuance	Feb. 7, 1927.
29.	Speiial appearance and Demurrer	Feb. 28, 1927.
30.	Special appearance and Motion to Make More Definite and Certain	Feb. 28, 1927.
31.	Order denying Motion to Quash, etc.	Feb. 28, 1927.
32.	Order Overruling Demurrer	Mar. 1, 1927.
33.	Order Overruling Motion to Make More Definite etc.	Mar. 1, 1927.

Paper	Date of filing in superior court
[fol. 529] 34. Order on Motion to Make More Definite and Certain and Bill of Particulars	Mar. 24, 1927.
35. Respondent's Proposed Findings of Fact, (Woodruff, Flick and Wick)	Mar. 24, 1927.
36. Notice of Presentation of Order of Consolidation, Findings of Fact, Conclusions of Law and Order of Public Use and Necessity	Mar. 24, 1927.
37. Order of Consolidation, Findings of Fact, Conclusions of Law, Order of Public Use and Necessity	Mar. 24, 1927.
Omitting the following: Par. XIV of Findings of Fact—omit all of same down to the words "That on the 13th day of Sept. 1909," etc. Par. II of Order of Public Use & Necessity, Omit, beginning with the words "In cause 7389" down to and including the words "above mean sea level" immediately preceding Par. "III" of said Order.	
38. Notice of setting for trial	Mar. 26, 1927.
39. Jury Demand	Mar. 26, 1927.
40. Exceptions to Findings of Fact, Conclusions of Law and Order of Public Use and Necessity Alice Barbee Wick	Mar. 29, 1927.
41. Exceptions to refusal of court to sign proposed Findings of Fact and Conclusions of law, Alice Barbee Wick	Mar. 30, 1927.
42. Respondent Wick's Proposed Findings of Fact	Mar. 30, 1927.
43. Note of Issue	Apr. 15, 1927.
44. Affidavit of Service of Note of Issue	Apr. 15, 1927.

The following from papers on file in Cause 20635:

Paper	Date of filing in supreme court
45. Petition for Writ of Certiorari from Order of Public Use and Necessity	Apr. 21, 1927.
46. Order on Motion to show cause	Apr. 21, 1927.
47. Affidavit of Service of Order to Show cause	Apr. 25, 1927.
48. Order advancing hearing	Apr. 25, 1927.

The following from papers on file in this cause:

Paper	Date of filing in superior court
49. Bill of Particulars	Apr. 27, 1927.

[fol. 530] The following papers on file in cause 20635:

Paper	Date of filing in supreme court
50. Affidavit of service of Order	Apr. 29, 1927.
51. Proof of Service (Wm. A. Grimshaw)	Apr. 29, 1927.
52. Affidavit of Adrien W. Vollmer	Apr. 29, 1927.
53. Order granting Writ of Certiorari	Apr. 29, 1927.
53-A. Writ of Certiorari	Apr. 29, 1927.
54. Motion for Stay of Proceedings with Notice and Affidavit of J. L. Baldwin thereto attached	June 14, 1927.
55. Affidavit of Edwin C. Matthias in resistance to Motion for Stay	June 17, 1927.
56. Order Denying Motion for Stay	June 23, 1927.

The following from papers on file in this cause:

Paper	Date of filing in superior court
57. Notice of Petition and Bond on Removal	June 27, 1927.
58. Petition for Removal to U. S. District Court with affidavit of Adrien W. Vollmer thereto attached	June 27, 1927.

Paper	Date of filing in superior court
59. Bond on Removal	June 27, 1927.
60. Proposed Order of Removal	June 27, 1927.
61. Order Denying Petition for Removal	June 28, 1927.
62. Respondent Wick's proposed Instructions	June 30, 1927.
63. Court's Instructions	June 30, 1927.
64. Verdict and Answer to Interrogatories	June 30, 1927.
65. Respondent Wick's Exception to Instructions	July 2, 1927.
66. Motion for New Trial	July 2, 1927.
67. Respondent's Wick's Additonal Exceptions to Instructions	July 7, 1927.
68. Affidavit of Adrien W. Vollmer in Support of Motion for New Trial	July 7, 1927.
69. Order striking affidavit of Adrien W. Vollmer and denying Motion for New Trial	July 9, 1927.
70. Judgment on Verdict	July 9, 1927.
71. Decree of Appropriation	July 9, 1927.
72. Notice of Appeal	Aug. 2, 1927.

[fol. 531] From papers on file in Cause 20635:

Paper	Date of filing in supreme court
73. Opinion (Affirmed)	Sept. 1, 1927.
74. Order Denying Rehearing	Oct. 13, 1927.
75. Judgment	Oct. 13, 1927.
76. Remittitur	Oct. 13, 1927.
77. Writ of Error, U. S. Supreme Court	Jan. 9, 1928.
78. Petition for Writ of Error with Notices to join therein and affidavits of service thereof attached	Jan. 9, 1928.
79. Assignment of Errors	Jan. 9, 1928.
80. Order Allowing Writ of Error	Jan. 9, 1928.

Paper	Date of filing in supreme court
81. Memorandum of Giving of Bond	Jan. 9, 1928.
82. Citation on Writ of Error with Proof of Service	Feb. —, 1928.
From papers on file in this cause:	
83. Opinion (affirmed)	July 31, 1928.
84. Judgment entered	Sept. 4, 1928.
85. Remittitur	Sept. 4, 1928.
86. Petition for Appeal to U. S. Supreme Court, with notices to join in appeal and affidavits of service thereof, attached (original)	Oct. 10, 1928.
87. Assignment of Errors (original)	Oct. 10, 1928.
88. Order Allowing Appeal (Original)	Oct. 10, 1928.
89. Bonds on Appeal (2) Copies	Oct. 10, 1928.
89½. Ratification of Attorney's Act etc. (In re bond)	
90. Citation on Appeal with Proof of Service (Original)	1928.
91. Petitioner's Exhibit No. 27. (License to Chelan Electric Company from Federal Power Commission—Project 637, Washington, with Certificate of O. C. Merrill attached)	
92. Oral Decision of Superior Court, p. 489 &c. Part 2, Statement of Facts (Cause 20635)	
92½. Decree of Appropriation dated Jan. 4th, 1915, and Certificate, Exh. 26	
93. This Præcipe, with proof of service	

Adrien Winston Vollmer, Adrien Winston Vollmer, Attorney for Alice Barbee Wick, Appellant.

[fol. 532] Receipt of copy and service of the foregoing Præcipe admitted this 7th day of November, 1928.

Chelan Electric Company, by V. G. Shinkle, Secretary. Post & Russell, Edwin C. Matthias, Charles S. Albert, Attorneys for Appellee.

Due service of the foregoing Præcipe admitted and receipt of copy acknowledged this Fifth day of November, 1928.

J. A. Adams, Pros. Atty. Chelan Co.

[fol. 532½] In Supreme Court of Washington

No. 21274

[Title omitted]

Return of Service of Præcipe

United States of America,
Eastern District of Washington, ss:

I hereby certify that I served the annexed Præcipe for Alice Barbee Wick, Appellant, on the there-in-named Chelan Electric Company, a corporation, by handing same to and leaving a true and correct copy thereof with V. G. Shinkle, (Secretary Chelan Electric Company), personally at Spokane, Washington in said District, on the 7th day of November, A. D. 1928.

D. T. Ham, United States Marshal, by S. C. Sibley, Deputy.

[fol. 533] Return of Service of Præcipe

United States of America,
Western District of Washington, ss:

I hereby certify that I served the annexed Præcipe for Alice Barbee Wick, appellant, on the there-in-named Chelan Electric Company, a corporation, by handing same to and leaving a true and correct copy thereof with Edwin C. Matthias, Atty. of Record for Chelan Electric Co. personally at Seattle, in said District on the 2 day of Nov. A. D. 1928.

E. B. Benn, United States Marshal, by E. E. Gaskill, Deputy. (Seal.)

Fees and Ex., $2.20.

[fol. 534] In Supreme Court of Washington, Department Two, July 31, 1928

No. 21274

Chelan Electric Company, Respondent,

v.

Alice Barbee Wick, Appellant; Chelan County, Respondent

Opinion

This appeal is from the final award and judgment for damages in favor of appellant in condemnation proceedings.

This court has already passed upon most of the questions involved herein and have heretofore adjudged that the appropriator was entitled to appropriate and condemn as for public use and necessity. State ex rel. Woodruff v. Superior Court, 145 Wash. 129, 259 Pac. 379.

In other cases we have decided most of the questions, including Federal questions, raised upon this appeal that could have been available to appellant. State ex rel. Chelan Elec. Co. v. Superior Court, 142 Wash. 270, 253 Pac. 115; State ex rel. Flick v. Superior Court, 144 Wash. 124, 257 [fol. 535] Pac. 231; State ex rel. Woodruff v. Superior Court, supra; State ex rel. Perry v. Superior Court, 145 Wash. 178, 259 Pac. 382.

Upon such appeals, we have many times decided that under our statute, Rem. Comp. Stat., relating to appeals from such judgments for damages, no questions can be raised or determined in this court except questions relating to the propriety and justness of the amount of the damages awarded. Western American Co. v. St. Ann Co., 22 Wash. 158, 60 Pac. 158; Seattle & M. R. Co. v. Bellingham Bay & Eastern R. Co., 29 Wash. 491, 69 Pac. 1107, State ex rel. McCormick v. Superior Court, 43 Wash. 91, 86 Pac. 205; State ex rel. Port Townsend Southern R. Co. v. Superior Court, 44 Wash. 554, 87 Pac. 814; State ex rel. Pagett v. Superior Court, 46 Wash. 35, 89 Pac. 178; State ex rel. Grays Harbor Logging Co. v. Superior Court, 100 Wash. 485, 171 Pac. 238.

[1] Motions are made by respondents to strike the statement of facts and dismiss the appeal.

Unfortunately for appellant, the statement of facts herein must be stricken, although a very strong showing is made to excuse the failure to file the proposed statement of facts in the cause within ninety days after the entry of the judgment. For some reason it failed to reach the clerk of the lower court so as to be filed within the ninety days after the entry of the judgment. Judgment was filed and entered in the lower court on June 9, 1927. The statement of facts was not filed by the clerk of that court until October 8, 1927, which was on the ninety-first day after the entry of the judgment. There are undisputed and wholly trustworthy affidavits in the record by attorneys and their office assistants, who had had the matter in charge for appellant, of a diligent effort to get the statement of facts mailed from Seattle and delivered at Wenatchee, the county seat of Chelan county, within the ninety days. The statement of facts is shown to have been mailed in Seattle on October 6 and in the ordinary course of mail operation, as shown by undisputed affidavits of operatives at Seattle, it should have reached Wenatchee on October 7 at not later than 3:00 p. m. and have been delivered to the clerk of the court on that date in time for him to have filed it in his office.

Nevertheless, under our uniform decisions we are unable to grant appellant relief. It has always been held that the time for filing and serving a proposed statement of facts or bill of exceptions cannot be extended beyond ninety days from the entry of the judgment or order appealed from, because the statute is mandatory. It is a jurisdictional prerequisite. Therefore, when the proposed statement of facts was filed more than ninety days after the time of appeal began to run, it was wholly unauthorized and a nullity. State v. Terrien, 111 Wash. 345, 190 Pac. 1017; State ex rel. Soudas v. Brinker, 128 Wash. 319, 222 Pac. 615; State v. Harder, 130 Wash. 367, 227 Pac. 501.

Regretfully, therefore, the statement of facts is striken.

Upon this condition of the record, respondent contends that there is nothing more to consider, this being an appeal from the condemnation award and judgment.

We desire, however, not to close the way absolutely to a review by the United States supreme court, and to give appellant a final judgment on the merits.

[2] Appellant contends that the validity and propriety of certain instructions should be considered on this appeal.

We have held, contrary to the contention of appellant, that error in instructions to the jury cannot be reviewed on appeal in the absence of the evidence or any statement of facts on appeal from which it can be ascertained that the instructions were prejudicial to the appellant under the testimony produced and the verdict rendered. Morgan v. Bankers Trust Co., 63 Wash. 476, 115 Pac. 1047. And that, in the absence of the statement of facts, the court cannot review the evidence. Boh v. Boh, 133 Wash. 300, 233 Pac. 648.

Appellant insists, however, that certain of the instructions set out in the transcript are erroneous on their faces and prejudicial to appellant; that they should be reviewed and the judgment reversed and remanded for a new trial by reason thereof. In order to assure no injustice in the cause, we have examined the instructions assailed and find that as to those in which it is contended the court commented upon the facts, the court did no more than state facts which were conclusively shown by the record and established as properly shown by the record in the former Chelan Electric Co. cases cited, supra.

[fol. 536] As to those contended to have been argumentative, they did no more than declare that the appropriation was for a public use and the public interest required the prosecution of the enterprise, which we deem to be no more than stating that the use was for the public benefit.

[3] Another contention made by appellant in this appeal is new, involves, if valid, an ultimate Federal question, and is entitled to be considered.

It is insisted that the trial court erred in not granting applications for removal of the cause to the Federal court having local jurisdiction.

The case had been on trial from June 23, 1927, and upon the petitioner resting on June 27, appellant filed her petition for removal to the Federal court without any notice to Chelan County and without notice to the condemning petitioner, other than its presentation in court. After argu-

ment, the application was denied. Petitioner was then allowed to reopen its case, introduce additional testimony relating to tax payments and tax liens in favor of Chelan county, tending to show that Chelan county was a necessary and indispensable party to the proceedings, and rested again. Appellant then made a second motion to remove the cause to the Federal court.

The Federal statute, §29 of the U. S. Judicial Code (§72, Title 28 of the U. S. Code Ann.) requires that written notice of the petition and bond for removal shall be given the adverse party or parties prior to filing the same. This was not done.

The application was neither properly nor timely made.

The supreme court of the United States has held that a case arising under the laws of the United States, non-removable on the complaint, when commenced, cannot be converted into a removable one by evidence of the defendant or by an order of the court upon any issue tried upon the merits, but that such conversion can only be accomplished by a voluntary amendment of his pleadings by the plaintiff or, where the case is not removable because of joinder of defendants, by the voluntary dismissal or nonsuit by him of a party or parties defendant. Great Northern R. Co. v. Alexander, 246 U. S. 276.

In this case, there had been a previous removal by appellant to the Federal district court, which was by that court remanded to the state superior court. We held in State ex rel. Woodruff v. Superior Court, supra, that that remand was proper and that there was no improper rejoinder of parties. No claim was made in either removal application that there was a fraudulent purpose to defeat removal. In the Alexander case, supra, it was held that where there is no claim of fraudulent attempt to evade removal, the grounds for removal were to be determined by the allegations of the complaint or petition; that if the case was not then removable, it could not be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant.

We think the Alexander case, supra, answers all the contentions made by appellant here upon this subject.

Upon the record as it is, no other errors claimed by appellant are available to her.

The judgment is therefore affirmed.

Halcomb.

Fullerton, C. J., Askren, Main, and Beals, JJ., concur.

[fol. 537] In Supreme Court of Washington

No. 21274

Clerk's Certificate

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing are full, true and correct copies of such part of the record called for by the præcipe of appellant heretofore inadvertently omitted from the transcript in the above-entitled cause.

In testimony whereof I have hereunto set my hand and affixed the Seal of said Court, this 4th day of February, 1929.

C. S. Reinhart, Clerk. (Seal.)

[fol. 537½] [File endorsement omitted.]

[fol. 538] In Supreme Court of the United States

Motion for an Extension of Time Within Which to File Record and Order Extending Time—Filed Dec. 31, 1928

To the Honorable George Sutherland, Associate Justice of the Supreme Court of the United States:

Your petitioner, Alice Barbee Wick, respectfully presents this, her application for an extension of time within which to file the record upon an appeal from the Supreme Court of the State of Washington in the above entitled cause, and in support thereof presents the following:

That the appeal was allowed by the Supreme Court of the State of Washington on the 8th day of October, 1928.

The præcipe for the making up of the record was promptly filed with the clerk of the court, and the counter præcipe filed by the appellee November 6, 1928.

On December 4, 1928, an order was passed by the Supreme Court of the State of Washington extending the time for filing of the record until January 1, 1929. This order has been duly filed with the clerk of this Court.

Your petitioner has communicated with the clerk of the Supreme Court of the State of Washington requesting that she be advised when the record was ready to go forward, but up to this time has received no reply, and the time for filing the record expires today unless the same is fur-
[fol. 539 & 539½] ther extended.

Wherefore your petitioner prays that the time within which the record on appeal in the above entitled cause may be filed in this Honorable Court be extended to and including January —, 1929.

Joseph D. Sullivan, Counsel for Petitioner.

[fols. 540 & 540a] Order Extending Time Within Which to File Record

On consideration of the motion of counsel for petitioner in the above entitled cause, and good cause therefor having been shown, it is now here Ordered that the time within which the record on appeal may be filed herein, be and the same is hereby extended to and including January 15th, 1929.

Geo. Sutherland, Associate Justice of the Supreme Court of the United States.

Dated this 1st day of December, 1928.

[fol. 540b] [File endorsement omitted.]

[fol. 541] In Supreme Court of Washington

No. 21274

[Title omitted]

Order Extending Time—Filed in U. S. Supreme Court Jan. 10, 1929

It appearing to the court that the appellant has been granted a writ of error from the United States Supreme Court to this court in the above entitled cause, and the time in which record is due to be filed has about expired, and the record not having been completed, it is hereby ordered that the time for filing the record be extended to the 21st day of January 1929.

Done in open court this 28th day of December 1928.

Emmett N. Parker, Acting Chief Justice.

[fol. 541a] Certificate to foregoing paper omitted in printing.

[fol. 541b] [File endorsement omitted.]

Olympia, Washington, January 16, 1929.

[fol. 542] Joseph D. Sullivan, Atty., 900 F Street N. W., Washington, D. C.; Joseph B. Thomas, Atty., 26 South 15th Street, Philadelphia, Pa.; Adrien W. Vollmer, Atty., P. O. Box 1165, Portland, Oregon; Charles S. Albert, Atty., King St. Passenger Station, Seattle, Washington.

Gentlemen: I am forwarding today to the Clerk of the United States Supreme Court the transcript in re Chelan Electric Company vs. Miss Wick.

Yours very truly, C. S. Reinhart, Clerk.

[fols. 543 & 543½] IN SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO FILE RECORD —Filed Jan. 21, 1929

On consideration of the motion of counsel for petitioner in the above entitled cause, and good cause therefor having been shown, it is now here ordered that the time within which the record on appeal may be filed herein, be and same is hereby extended to and including Jany. 26th, 1929.

Geo. Sutherland, Associate Justice of the Supreme Court of the United States.

Dated this 21st day of January, 1929.

[fol. 544] IN SUPREME COURT OF THE UNITED STATES

MOTION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE RECORD—Filed Jan. 21, 1929

To the Honorable George Sutherland, Associate Justice of the Supreme Court of the United States:

Your petitioner, Alice Barbee Wick, respectfully presents this, her application for an extension of time within which to file the record upon an appeal from the Supreme Court of the State of Washington in the above entitled cause, and in support thereof presents the following:

That the appeal was allowed by the Supreme Court of the State of Washington on the 8th day of October, 1928.

The praecipe for the making up of the record was promptly filed with the clerk of the court, and the counter praecipe filed by the appellee November 6, 1928.

Orders have been filed with the clerk of this court for the extension of time up to and including January 21, 1929.

The clerk of the Supreme Court of the State of Washington has written a letter to the attorney for your petitioner, dated January 16, 1929, received January 21, 1929, in which [fols. 545 & 545a] he states that the record was forwarded January 16 to the clerk of the Supreme Court of the United States, but the same had not arrived today.

Wherefore your petitioner prays that the time within which the record on appeal in the above entitled cause may be filed in this Honorable Court be extended to and including January 31, 1929.

Joseph D. Sullivan, Counsel for Petitioner.

[fol. 545b] [File endorsement omitted.]

[fol. 546] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON AND PARTS OF RECORD NECESSARY FOR CONSIDERATION—Filed Feb. 2, 1929

Points to be Relied on

1. The notice by publication to appellant, Alice Barbee Wick, did not constitute due process of law under the provisions of the 14th Amendment to the Constitution of the United States.

Assignments of Error I, II, III, VII, and VIII.

2. The Statute of the State of Washington, providing for service on nonresidents in condemnation cases by publication (Remington's Compiled Statutes, Ed. of 1922, Sec. 922) is in conflict with the due process of law clause of the 14th Amendment to the Constitution of the United States.

Assignments of Error VII and VIII.

3. The statutes of the State of Washington, under which the condemnation of the land was sought, are in conflict with Article III, Section 2, paragraph 1, and Article IV, Section 2, and the 14th amendment of the Constitution of the United States.

Assignment of Error VIII.

4. The purpose for which the land was sought to be condemned did not constitute a public use, and that accordingly appellant's land was taken contrary to the 14th Amend-[fol. 547] ment to the Constitution of the United States.

Assignment of Error IX.

5. The statutes of the State of Washington, permitting the property of this appellant to be taken for the use for

which the Chelan Electric Co. proposes to take appellant's property, permit the taking of land for a private use and are therefore in conflict with the due process of law clause of the 14th Amendment to the Constitution of the United States.

Assignments of Error II, IX.

6. The petition contained no adequate description of the land to be taken, nor did it disclose whether the corporeal property or an easement was to be acquired, and for this reason the proceeding was contrary to the 14th Amendment and to Article III, Section 2, paragraph 1, and Article IV, Section 2, of the Constitution of the United States.

Assignments of Error I, II, XIV, XVI.

7. The extent of the land appropriated was in excess of that sought in the petition and authorized by the Federal Power Commission.

Assignments of Error XIII, XVI.

8. The court erred in instructing the jury that the Electric Co. were seeking only an easement, and that appellant would retain all rights and privileges incident to ownership not inconsistent with an easement.

Assignment of Error XIV.

9. The court erred in permitting the Chelan Electric Co. to file a bill of particulars after a motion for a bill of particulars had been denied, and after the order for public use and necessity had been entered.

Assignment of Error XII.

10. The court erred in refusing to find that the instructions to the jury granted, were argumentative and conflict-
[fol. 548] ing, and in refusing to grant the instructions prayed by appellant.

Assignment of Error XV.

11. The statutes of the State of Washington, providing that taxes upon real estate are a lien upon the land one year before they are permitted to be paid, are in conflict with Article III, Section 2, paragraph 1 of the Constitution of the United States.

Assignments of Error IV, VI.

12. The appellant was improperly deprived of her right to have the cause removed to a Federal Court.

Assignments of Error V, X, XI and XII.

[fol. 549] Parts of Record Necessary for Consideration

		Page
1.	Petition	4
2.	Return on nonresidents	12
3.	Affidavit for publication	13
4.	Special appearance and motion to quash and vacate with affidavit of Adrien W. Vollmer (affidavit omitted through error and to be supplied)	15
5.	Affidavit of publication and notice published	19
6.	Notice of petition and bond for removal	21
7.	Petition for removal	23
8.	Objections to removal	29
9.	Order removing cause	32
10.	Motion to remand	33
11.	Affidavit of E. C. Matthias	36
12.	Order granting motion to remand	46
13.	Special appearance and demurrer	51
14.	Motion to make more definite and certain	54
15.	Order denying motion to quash, etc.	56
16.	Order overruling demurrer	57
17.	Order overruling motion to make more definite	58
18.	Respondent's proposed findings of fact (as given on page 61 of record part is omitted in error)	241
19.	Order of consolidation, etc.	62
20.	Exceptions to findings of fact	83
21.	Exceptions to refusal of court	87
22.	Respondent's proposed findings of fact (Part omitted in error and to be supplied)	90
23.	Order on motion to make more definite and certain	59
24.	Note of issue	94
25.	Order allowing Writ of Certiorari (Omitted in error and to be supplied)	
26.	Motion for stay of proceedings	265
[fol. 550] 27.	Order denying stay	274
28.	Opinion of the court	347
29.	Judgment on certiorari	349

		Page
29a.	Notice of petition for removal (Omitted in error and to be supplied)	
30.	Petition for removal	275
31.	Bond on removal	280
32.	Proposed order of removal	281
33.	Order denying removal	283
34.	Instructions to jury requested	287
35.	Instructions to jury given	292
36.	Verdict	321
37.	Exceptions to instructions given to jury, etc	322
38.	Motion for a new trial	326
39.	Additional exceptions to instructions	328
40.	Judgment on verdict	333
41.	Decree of appropriation	340
42.	Notice of appeal	346
43.	Opinion on appeal of Supreme Court, State of Washington. (Omitted in error and to be supplied)	
44.	Judgment on appeal	348½
45.	Assignments of error	399
46.	Order allowing appeal	405
47.	Memorandum of bond given on appeal	411
48.	Memorandum of citation and service on appeal	414

Joseph D. Sullivan, Attorney for Appellant.

[fols. 551 & 551a] DISTRICT OF COLUMBIA, SS:

Joseph D. Sullivan, being first duly sworn, says that on the 1st day of February, A. D. 1929, he mailed by registered mail, postage prepaid, copies of the statement of points to be relied on and parts of the record necessary for consideration above set out, addressed to Edwin C. Matthias, 302 King Street Passenger Station, Great Northern Railway, Seattle, Washington, one of the attorneys of record for the appellee in the above named proceeding, and affiant attaches hereto the receipt issued by the Post Office Department to him for such registered letter.

Joseph D. Sullivan.

Subscribed and sworn to before me this 2nd day of February, 1929. Eleanor L. Marron, Notary Public, D. C. (Seal of Eleanor L. Marron, Notary Public, District of Columbia.)

(Postmark of) Washington (F Street Sta), D. C. Registered. Feb. 1, 1929.

Receipt for Registered Article No. 870387.

Registered at the Post Office indicated in Postmark.

Fee paid: — cents. Class postage: —.

Return Receipt fee: —. Spl. Del'y fee: —.

Delivery restricted to addressee, —— ——, in person, or order, —— ——.

Accepting employee will place his initials in space indicating restricted delivery.

Postmaster, per —— —— (Mailing office).

Complete record of registered mail is kept at the post office, but the sender should write the name of the addressee on back hereof as an identification. Preserve and submit this receipt in case of inquiry or application for indemnity.

Registry Fees and Indemnity.—Domestic letters and sealed parcels indemnified for $50 or less, 15 cents; for over $50 and not in excess of $100, 20 cents; domestic second-class, not indemnified, 15 cents; domestic third-class, indemnified up to $25, 15 cents; articles addressed to foreign countries, regardless of class or indemnity, 15 cents. Claims must be filed with postmasters within one year from date of mailing.

Form 3806. c 5—6852.

[fol. 551b] [File endorsement omitted.]

[fol. 552] In Supreme Court of the United States

Designation of Additional Parts of Record to be Printed —Filed Feb. 13, 1929

To the Clerk of the above-entitled Court:

The respondents designate the following additional parts of the record which they think material and which they desire to have printed by the Clerk as part of the printed record:

	Filed superior court
1. Notice of filing condemnation petition	Sept. 17, 1926
2. Sheriff's return on non-resident	Sept. 22, 1926

Filed in superior court

3. Order for Continuance ..... Oct. 17, 1926
4. Affidavit of Publication ..... Oct. 20, 1926

Filed U. S. dist. ct.

5. Order to show cause ..... Nov. 1, 1926
6. Affidavit of A. M. Anderson in support of Motion to Remand ..... Nov. 3, 1926
7. Affidavit of R. A. Scheble ..... " " "
8. " " J. A. Adams ..... " " "

Filed superior ct.

9. Order of Continuance ..... Nov. 4, 1926
10. " " " ..... Dec. 6, 1926
11. " " " ..... Feb. 7, 1927
12. Order on Motion to Make More Definite and Certain and for Bill of Partic ... March 24, 1927
13. Notice of Presentation of Order of Consolidation, Findings of F., Conclusions of Law and Order of Pub. Use and Necessity ..... March 24, 1927
14. Notice of setting for trial ..... March 26, 1927
15. Bill of Particulars ..... April 27, 1927
16. Affidavit of Edwin C. Matthias in resistance to Motion for Stay ..... June 17, 1927

[fol. 553] 17. Remittitur ..... Oct. 13, 1927

18. Petitioner's Exhibit No. 27, (License to Chelan El. Co. from Federal Power Commission, Project 327, Washington, with certificate of O. O. Merrill attached).
19. The following from "Transcript of Record," filed in Cause 21274 (Cause 7391, Superior Court of Chelan County) objection of Chelan County to removal of cause to U. S. Court, filed June 27, 1927 in Superior Court Chelan County.
20. List of docket entries in the Superior Court of Chelan County with date of filing from Sept. 17, 1926 to Sept. 1, 1927.
21. List of docket entries in the Superior Court of Chelan County, Sept. 1, 1927 to April 20, 1928.
22. Objection of Chelan County to removal of cause 7391 to the U. S. District Court filed June 27, 1927.
23. Notice of withdrawal of D. C. Conover as attorney in cause 7391, Superior Court Chelan County, filed Feb. 28, 1928.

24. Order Supreme Court of Wash. striking the statement of facts in this cause, 21274.
Thomas Balmer, Edwin C. Matthias, Charles S. Albert, Attorneys for Respondents.

[fol. 554] [File endorsement omitted.]

Endorsed on cover: File No. 33,961. Washington Supreme Court. Term No. 652. Alice Barbee Wick, appellant, vs. Chelan Electric Company. Filed January 25th, 1929. File No. 33,961.

FILE COPY

Office Supreme Court
FEB 19

In the Supreme Court of the United States

OCTOBER TERM, 1928.

No. 29

ALICE BARBEE WICK, *Appellant,*

vs.

CHELAN ELECTRIC CO.

Basis on Which It Is Contended This Court Has Jurisdiction.

JOSEPH D. SULLIVAN,
ADRIEN W. VOLLMER,
Attorneys for Appellant.

J. D. MILANS & SONS, 707 EIGHTH ST. N. W., WASHINGTON, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1928.

No. 652.

ALICE BARBEE WICK, *Appellant,*

vs.

CHELAN ELECTRIC CO.

Basis on Which It Is Contended This Court Has Jurisdiction.

A. Appellant refers to the provision of law believed to sustain the jurisdiction of this Court as Section 237 of the Judicial Code, as amended, as she draws in question the validity of the statute of a state on the ground of its being repugnant to the Constitution of the United States.

B. Judgment of the Supreme Court of the State of Washington (R. 348½). Entered September 4, 1928. Appeal allowed October 8, 1928 (R. 405).

While the judgment remands the case to the Superior Court of Chelan County, the record shows that the entire case has been decided, and the decree of appropriation (R. 340), passed July 9, 1927, before the appeal was taken, shows that the land has been taken

from the appellant, and there is no further proceeding which the lower court can have, and no further order that it can make in the premises.

C. The appellant attacks certain laws of the State of Washington as interpreted by the Supreme Court of the State of Washington, on the ground that they are in conflict with the due process of law clause of the 14th Amendment of the Federal Constitution.

1. Appellant attacks the validity of the statute providing for service on nonresidents in condemnation cases by publication (Remington's Compiled Statutes, Ed. 1922, Sec. 922) as it was interpreted in this case. This statute provides, "A notice stating briefly the objects of the petition, and containing a description of the land, real estate, premises or property sought to be appropriated, and stating the time and place when and where the same will be presented to the court, or judge thereof, shall be served on each and every person named therein as owner, encumbrancer, tenant or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. * * * In all cases where the owner or person claiming an interest in such real or other property, is a nonresident of this state, or where the residence of such owner or person is unknown, * * * service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks. * * * Such publication shall be deemed service upon each of such nonresident person or persons whose residence is unknown * * *."

In this case the hearing was set for the 11th of October, 1926, and three publications were made between the 23rd of September and the 7th day of October. One

more publication was given than the law made obligatory, but this did not change the situation, because the third publication was made on the first day after the two weeks had expired, and the case was for hearing on the fourth day thereafter. The publication and the ten days notice were given simultaneously and the court held that this was a proper publication and notice under the statute. Under the ordinary interpretation of this statute the publication should have been made for a full period of two weeks, or fourteen days from the 23rd day of September, the first day of the publication, and this would have amounted to service of the notice, the length of which was fixed by law as ten days, and therefore, the case should not have been heard before October 17, 1926, or ten days after service of the notice had been made. Service was not made until the publication was complete. After that there was but four days to appear and answer. The defect in the notice was called to the attention of the court by a motion to quash the notice combined with a motion to quash the service (R. 15, paragraphs 7 and 9 of both motions), in which the validity of the proceeding under the due process of law clause of the Federal Constitution was raised. The validity of the proceeding under the 14th Amendment of the Federal Constitution was raised by a demurrer (R. 51), and in particular by the six and tenth grounds of the demurrer. The court denied the motions to quash (R. 56) and overruled the demurrer (R. 57).

Appellant again raised the constitutional question in submitting proposed conclusions of law (R. 241) and particularly conclusions of law Nos. 2 and 4, which were refused (R. 520 [Supplemental Record]).

The Supreme Court of the State of Washington in its opinion on this point said:

"Other than the matter of the description of the property hereinbefore discussed, the argument is that the two weeks' publication of notice provided for by statute is unreasonably short to constitute due process of law. A great number of authorities are cited by each side upon this important point. They have been examined but we do not find it necessary or practical to cite or discuss all of them. Counsel for the relator has called attention to authorities deciding the number of publications and intervening time necessary to satisfy a statute requiring publication for a given number of successive weeks. But that is not the question here where under the statute requiring publication once a week for two successive weeks, the fact is that notice was so published for three successive weeks. The real question here is that of reasonable notice to a nonresident and opportunity to be heard. The case nearest in point cited, quoted from and apparently relied on by this relator is Roller vs. Holly, 176 U. S. 398, 44 L. Ed. 520. In that case it was held that a nonresident defendant who was called upon to answer a suit pending in Texas, while he himself was in Virginia, within five days of date of service of citation, was not furnished due process of law. That is, the time under the circumstances was unreasonably short. But we may and of course do agree with that case and still it does not lead to the striking down of our statute that is complained of nor to a holding that the notice in the present case was unreasonably short. Counsel argues, as we understand, that because our statute speaks of two weekly publications that it means eight days' notice and that that length of time under the circumstances in this case does not furnish due process of law under the doctrine of the Roller case. That case speaks of

the date of service with relation to the return day. Our statute says nothing whatever about a return day, but only the number of publications of the notice where publication must be had. The return day not being regulated by statute, as was the case in Roller vs. Holly, *supra*, it is fixed independently of it, so that the question in this case is, was the eighteen days' notice that was actually given, that is the time that elapsed from the date of the first publication of the notice and the return day, unreasonably short under the provision of the constitution?''

In sustaining the service in this case and construing its statute to permit the publication against a nonresident to run simultaneously with the ten days' notice, the State of Washington has made it possible under this statute to have a valid service of process for hearing by giving a notice of ten days and publishing it twice at an interval of eight days within the ten days, and this under the decision of this court is not due process of law upon a nonresident property owner. It is unreasonable to require a property owner in Philadelphia, Pennsylvania, to appear in Chelan County, Washington, ten days after the first publication of a newspaper notice in that county and without other notice. A proceeding under a statute which permits this is not due process of law even though an additional day or two is granted as a favor.

2. The appellant also challenges the validity of the laws of the State of Washington for the condemnation of land on the ground that they are in conflict with the provisions of the due process of law clause of the 14th Amendment of the Federal Constitution, because as interpreted in this case by the Supreme Court of the

State of Washington, they permit the taking of appellant's property for a private use. This question was raised by demurrer (R 51) in the fourth, sixth and tenth grounds. The demurrer was overruled (R. 57). The same question was again raised in proposed findings of fact and conclusions of law (R. 241) and in the exceptions to the findings of fact and conclusions of law made by the court (R. 83 and 87).

The trial court found as a matter of fact that "the electric energy to be generated in said new plant (that of the Chelan Electric Co.) will be delivered to the Washington Water Power Co. at the switchboard of the said new plant for transmission by the Washington Water Power Co. to its customers in the State of Washington" Finding of Fact VI (R. 69). The trial court also by conclusion of law No. 2 (R 79) found as a matter of law that such a use was a public use, thus interpreting its statute of eminent domain as authorizing appellant's land to be taken for such a use.

The objection to the taking as repugnant to the 14th Amendment of the Constitution of the United States was made by demurrer (R. 51) in grounds 6 and 10, and was renewed in the proposed findings of fact and conclusions of law (R. 241) and particularly findings of fact I and VII and XI, and conclusions of law IV and VII (R. 520), and in the additional proposed conclusions of law (R. 520). Due exception was taken (R. 83).

The Supreme Court of the State of Washington passed upon this point as follows:

> "It is claimed that the use contemplated in this case is not a public one, because the Chelan Electric Co. has no transmission line nor any customer except the Washington Water Power

> Co. which owns practically all of the stock of the Chelan Electric Co. That situation was explained in the Getty case. The Washington Water Power Co. is a public service corporation of this state and is handling the enterprise in the name of the other corporation which was organized for similar public purposes. So far as this point is concerned, there is no question about the public use to which the property will be put."

The use to which appellant's land was to be put was to provide for the operation of a hydroelectric plant by the Chelan Electric Co. which proposed to sell all of the current so generated to another power company, undoubtedly greatly to the profit of the Chelan Electric Co. and not to the interests of the public. Statutes which permit such a taking are in conflict with the 14th Amendment of the Constitution of the United States.

3. Appellant also attacks the validity of the statutes providing that taxes upon real estate are a lien upon the land one year before they are permitted to be paid, and says that these statutes are in conflict with Article III, Sec. 2, paragraph 1 of the Constitution of the United States (Remington's Compiled Statutes, 1922).

> Sec. 11234 (9212). "* * * The amount of levy as determined annually by the state board, shall be certified by the auditor of state to each county on or before the last Monday of September of each year. The county taxes shall be levied by the county commissioners between the first and second Mondays of October of each year. * * *"

Sec. 11235 (9213). "For the purpose of raising a revenue for the state, county indebtedness, county current expenses, school, road and other purposes, the board shall, at said October session, levy a tax on all taxable property in the county, as shown by the assessment-roll, sufficient for such purposes: * * *"

Sec. 11239 (9216). "The assessment year contemplated in this chapter shall commence on the first day of March and end on the last day of February in each year, and the fiscal year contemplated in this chapter shall commence on January first and end on December thirty-first of each year."

Sec. 11241 (9218). "On the first Monday of January next succeeding the date of the levying of taxes, the county auditor shall deliver to the county treasurer the tax rolls of his county, with his warrant thereto attached, and taking his receipt therefor, and charging the county treasurer therewith, and keeping an account thereof in the manner required by law."

Sec. 11240 (9217). "* * * The amount of said tax due upon such books shall be charged to the treasurer in an account to be designated as treasurer's 'Tax-roll account' * * * Provided, that the county treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such tax upon said assessment-rolls before the first Monday of said February following."

Sec. 11252 (9219). "* * * All tax upon real property made payable by the provisions of this act shall be due and payable to the treasurer as aforesaid on or before the thirty-first day of May in each year, * * *."

Sec. 11267 (9230). "All taxes and levies which may hereafter be lawfully imposed or assessed shall be and they are hereby declared to be a lien respectively upon the real estate upon which they may hereafter be imposed or assessed * * *"

Sec. 11272 (9235). "The taxes assessed upon real property shall be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the first Monday of February of the succeeding year. * * *"

Appellant applied for a removal of this cause to a Federal Court (R. 23), October 30, 1926, and the cause was thereupon removed (R. 32). A motion to remand the cause to the county court of Chelan County was thereupon made on the ground that County of Chelan was a necessary, proper and indispensable party to the cause because it held a lien upon this land for the taxes which became due and payable on the 31st day of May, 1927 (R. 33). This motion, made at the request of the Chelan Electric Co., was granted and the cause was remanded November 3, 1926, notwithstanding the fact that the taxes could not be paid by appellant until February, 1927. Appellant was thereby deprived of her right to have this case tried in the Federal Court. Subsequently, on the 27th of June, 1927, at the hearing of the cause to determine the damage to appellant by the taking of her property, after the Chelan Electric Co. had rested its case without proving that any taxes were then due to the County of Chelan, a new petition and bond for removal was filed (R. 275 and 280), and a proposed order of removal was prepared and submitted to the court in

open court. The court took the matter under advisement and the following day signed an order denying a removal to the Federal Court (R. 283).

The Supreme Court of the State of Washington ruled on this point as follows:

> "The relator, Alice Barbee Wick, is and was a resident of Philadelphia, Pennsylvania, and error is assigned on her behalf to the effect that the County of Chelan was improperly made a joint defendant with her, having the effect it is claimed, of depriving her of the right to a removal of her case to the Federal court on account of diverse citizenship. Two answers may be made: first, at the time the action was commenced, general taxes due the County were outstanding and a lien upon the property, and Section 921, Remington's Compiled Statutes, requires the petition in eminent domain cases to set forth the name of each and every owner, encumbrancer or other person or party interested in the property and Section 922, Remington's Compiled Statutes, requires that a notice of such petition be served on each and every person; and second, the record shows that prior to the hearing herein by the trial court, relator Wick did remove the case against her to the Federal court, and upon a hearing thereon that court promptly remanded the cause to the State court, from which order of the Federal court it appears no appeal was prosecuted, nor review sought or had."

The second ground mentioned by the Supreme Court of the State of Washington in this opinion is, of course, baseless for the reason that no appeal or review of the order remanding the cause from the Federal court to the State court would lie. Appellant contends that the interpretation of the State Supreme

Court of this act to the effect that the taxes were a lien upon the property and that therefore the Chelan County was a necessary party to a condemnation proceeding, brings these statutes in conflict with Article III, Sec. 2, paragraph 1 of the Constitution of the United States conferring jurisdiction upon Federal courts over causes where the parties are citizens of different states. The effect of this statute is to deprive any non-resident of the State of Washington of the right to remove a condemnation proceeding to a Federal court.

The validity of the proceeding was also challenged on the ground that it conflicted with the 14th Amendment to the Federal Constitution because there was no adequate description of the property sought to be condemned, that the land appropriated was in excess of the amount authorized by the Federal Power Commission and that the petition did not disclose whether an easement or the title to the property was being condemned.

All of these points were raised by the motions to quash (R. 15) and the demurrer (R. 51), by the proposed conclusions of law and fact (R. 241) and (R. 90) and were passed upon by the Supreme Court of the State of Washington in its opinion in this case (R. 347). These rulings were assigned as error (R. 372).

D. Where the statute of a state as interpreted and applied by the State Court is repugnant to the Constitution a writ of error is proper. Crew Levick Co. vs. Pennsylvania, 245 U. S. 292. Kenney vs. Supreme Lodge, 252 U. S. 411.

Where the law as construed interferes with the rights of persons guaranteed under the Constitution, a writ of error will lie. Mountain Timber Co. vs. Washington, 243 U. S. 219.

The test of constitutionality is to be found in the operation and effect of the law as applied and enforced by the State. St. Louis Southwestern R. R. Co. vs. Arkansas, 235 U. S. 350.

The taking of property for a private use does not constitute due process of law. Hendersonville Light & Power Co. vs. Blue Ridge Interurban Co., 243 U. S. 563.

Where the state's Supreme Court has treated Federal questions as necessarily involved and decided them against the plaintiff, it is immaterial how the questions were raised. Cissna vs. Tennessee, 246 U. S. 289.

Respectfully submitted,

JOSEPH D. SULLIVAN,
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Attorneys for Appellant.

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SEP 3

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 29.

ALICE BARBEE WICK, *Appellant,*

vs.

CHELAN ELECTRIC COMPANY, *Appellee.*

BRIEF ON BEHALF OF APPELLANT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 29.

ALICE BARBEE WICK, *Appellant*,

vs.

CHELAN ELECTRIC COMPANY, *Appellee*.

BRIEF FOR APPELLANT.

Statement of Facts.

The appellant, Alice Barbee Wick, is the owner of a tract of land of twelve hundred acres, which borders for a distance of approximately three and one-half miles on Lake Chelan, in the State of Washington, famous as being one of the most beautiful of the mountain lakes in this country, and regarded throughout the land as the equal of Lake Lucerne, Switzerland. She is a citizen of Pennsylvania, and resides in Philadelphia.

The Chelan Electric Co., which is a power producing company, closely allied to the Great Northern Railway Co., and owned by the Washington Power Co., an octopus of water power enterprises in the State of Washington, instituted a number of separate proceedings for the condemnation of the land on the borders of Lake Chelan, so that it might raise the waters of the lake and overflow the land adjacent to the shore, and erect and operate a hydroelectric power station for the purposes of converting the water power afforded by Lake Chelan and the Chelan River into electric energy.

One of these proceedings was that now before the court in which it sought to obtain by condemnation rights in approximately thirty-two acres belonging to appellant, which were the lake frontage of her twelve hundred acre tract.

It filed its petition alleging that it was necessary for the petitioner to maintain and operate a dam and reservoir for the storage of water at a maximum elevation of 1,100 feet above mean sea level, and to acquire the perpetual right to inundate and overflow to the maximum elevation of 1,100 feet above mean sea level "the following described real estate situate in the County of Chelan" (R. 8). Then followed a description of the entire tract of land of twelve hundred acres owned by the appellant, of which but thirty-two acres were later found to be affected by the overflow incident to raising the waters of the lake, but containing no description of the thirty-two acres actually sought to be taken. The petition also set forth that "the names of each and every owner, encumbrancer and person or party interested in the above-described property" were "Alice Barbee Wick and Chelan County, Wash-

ington, a municipal corporation." The petition prayed among other things that "upon payment thereof by the petitioner full title to said property shall be at once vested in the petitioner" (R. 9-10).

The petition was filed September 17, 1926, and the same day a notice was issued, directed to Alice Barbee Wick, that the petition and proof in support thereof would be presented to the court on the 11th day of October, 1926, for hearing and determination (R. 1). The following day a return was made by the sheriff that he had received a copy of the notice and petition to serve on Alice Barbee Wick, that he had made diligent search for and was unable to find her, and he certified upon information and belief that she was a nonresident (R. 10).

A copy of the notice was then published in a daily newspaper printed in the City of Wenatchee, Chelan County. The affidavit of publication is that it was published "once a week for a period of three consecutive weeks," during the interval between September 23, 1926, and October 7, 1926, inclusive, but without disclosing the days of publication (R. 15-16). No service of process or notice was given to the owner of the land other than this publication in an obscure newspaper in Chelan County, Washington.

Appellant, by special appearance in this case, sought to quash this service, contested the legality of the notice, the validity of the statutes for service on nonresident owners, and the jurisdiction of the court, and contended that by reason of the failure to serve her with notice the proceeding did not constitute due process of law under the Fourteenth Amendment of the Federal Constitution (R. 12).

She likewise sought to have the cause removed to the District Court of the United States, on the ground of the diverse citizenship of the parties (R. 19). An order for removal was granted and the cause duly removed to the District Court of the United States for the Eastern District of Washington (R. 24). The Chelan Electric Company moved to remand the cause (R. 25) upon the ground that the County of Chelan had levied taxes to the extent of $842.52 upon the entire tract of land, which were due and payable on or before the first Monday of February, 1927, and constituted a lien upon the land in favor of the County of Chelan, which was therefore a proper party respondent to the petition, and that this was sufficient to prevent the removal of the cause (R. 27).

The cause was remanded by the Federal District Court to the Superior Court of the State of Washington in and for Chelan County (R. 34). This action was apparently based upon the ground that the taxes had been levied and constituted a lien upon the land. At that time, however, while levied these taxes could not have been paid by the owner of the land, the policy of the State being to make the levy far in advance of the time of payment. The levy was made March 1, 1926. Taxes could not be paid before the first Monday in February, 1927 (Appendix 62). An order was entered denying her motion to quash, vacate and set aside the notice and the service of the notice (R. 41).

Appellant made a motion under a special appearance (R. 39), preserving her rights and exceptions to the ruling of the court previously made, to have the petition made definite and certain, so that it would set out with reasonable certainty the portion of the land

which the petitioner proposed to acquire, and, also, whether the petitioner sought to acquire a fee simple or merely an easement of flowage.

She at the same time, and under special appearance reserving her rights and exceptions, demurred to the petition (R. 37).

All points raised by her were adversely decided, and her motion to make definite and certain and her demurrer were overruled (R. 42-43).

Thereupon, the trial of the question of public use and necessity was held, an order was entered setting out the findings of fact (R. 45), and a conclusion of law that the public interest required a prosecution of the enterprise, and that the land sought to be acquired was necessary for the purposes of the enterprise, and authorizing the taking from Alice Barbee Wick "the right in perpetuity to inundate and overflow to the maximum elevation of 1,100 feet, still water measurement, above mean sea level, the following real estate." Then followed a description of the entire tract owned by Miss Wick (R. 63). Proper exceptions were taken, and a Writ of Certiorari was allowed by the Supreme Court of the State of Washington (R. 194). The case was there reviewed and the lower court affirmed (R. 149).

The opinion of the Supreme Court of the State of Washington delivered upon this proceedings in certiorari is printed in the record (R. 142).

Without awaiting the decision of the Supreme Court of the State of Washington upon the certiorari proceedings, the Superior Court of Chelan County proceeded with the hearing of the case. The findings of fact and conclusions of law upon the question of public use and necessity were signed in open court March 24,

1927 (R. 62). The petitioner noted the case for setting for trial at the April term, 1927, first on Saturday, the 2nd of April, 1927 (R. 64), and later for Saturday, April 30, 1927 (R. 75). Notwithstanding the fact that a motion to make more definite and certain made by appellant had been denied (R. 43), a bill of particulars was filed April 27, 1927 (R. 75), after a decree of public use and necessity had been made (R. 62).

Appellant moved in the Supreme Court of the State of Washington for a stay of the proceedings (R. 82), and on June 23, 1927, the stay of proceedings was denied (R. 86). The case went to hearing and the petitioner having called witnesses and rested, the appallant on June 27, 1927, presented a petition for removal of the proceeding to the Federal Court, and the proper bond and an accompanying affidavit, setting out as the ground for removal that there was no evidence introduced or offered on behalf of the petitioner showing any interest of the Chelan County in the controversy. A copy of this petition, bond and affidavit were served upon the petitioner, and were then handed to the clerk of the court, filed and presented to the court in the courtroom in which the case was being tried (R. 86-95).

The following day, the 28th of June, 1927, after argument, an order was signed denying the petition for removal (R. 95).

Thereafter, the hearing of the cause proceeded and certain instructions were submitted to the jury on behalf of the appellant which the court refused (R. 95-98), and thirty-six instructions were submitted on behalf of the petitioner which the court granted (R. 98-114). Exceptions were duly noted by appellant (R. 115-121) (R. 122-125). An award was made by the verdict of

the jury. Judgment was rendered on the verdict (R. 125-133), and at the same time a decree of appropriation was signed reciting the deposit of the amount awarded by the jury with the clerk of the court and decreeing that there was vested in the Chelan Electric Company "the following described property, lands and premises," and then follows a lengthy description by metes and bounds of the property, and a further decree releasing the Chelan Electric Company from all liability for damage growing out of the impounding and storing of the waters of the lake and raising the same to the maximum elevation of 1,100 feet still water measurement, and granting to the Chelan Electric Company right of possession (R. 134-141).

Proper exceptions were noted and an appeal taken to the Supreme Court of the State of Washington (R. 142). Upon the hearing the Supreme Court of the State of Washington affirmed the judgment below (R. 149). The opinion of that court upon this appeal is set out in the record (R. 202).

The record shows by the findings of fact made by the judge of the Superior Court of Chelan County the following uncontroverted facts: The entire capital stock of the Chelan Electric Company except the qualifying shares of five members of the Board of Trustees, each holding one share, is owned by the Washington Water Power Company, a twenty million dollar power concern affiliated with the Great Northern Railway Company, and the owner of five hydroelectric plants in the State of Washington, and through a subsidiary company the owner of another hydroelectric plant in the State of Washington, and the owner of a hydroelectric power plant in the State of Idaho (R. 53-55). That it has been selling and transmitting energy into

the State of Idaho from the State of Washington (R. 56). All of its power plants are connected together by high voltage transmission lines. The court also further states that "the electric energy to be generated in said new plant (Chelan Electric Company) will be delivered to the Washington Water Power Company at the switchboard of said new plant for transmission by the Washington Water Power Company to its customers in the State of Washington (R. 56).

Specification of Assigned Errors Intended to Be Urged.

1. The notice by publication to appellant, Alice Barbee Wick, did not constitute due process of law under the provisions of the 14th Amendment to the Constitution of the United States.

Assignments of Error I, II, III, VII and VIII.

2. The statute of the State of Washington, providing for service on non-residents in condemnation cases by publication (Remington's Compiled Statutes, Ed. of 1922, Sec. 922), is in conflict with the due process of law clause of the 14th Amendment to the Constitution of the United States.

Assignments of Error VII and VIII.

3. The statutes of the State of Washington, under which the condemnation of the land was sought, are in conflict with Article III, Section 2, paragraph 1, and Article IV, Section 2, and the 14th Amendment of the Constitution of the United States.

Assignment of Error VIII.

4. The purpose for which the land was sought to be condemned did not constitute a public use, and that accordingly appellant's land was taken contrary to the 14th Amendment to the Constitution of the United States.

Assignment of Error IX.

5. The statutes of the State of Washington, permitting the property of this appellant to be taken for the use for which the Chelan Electric Company proposes to take appellant's property, permit the taking of land for a private use, and are, therefore, in conflict with the due process of law clause of the 14th Amendment to the Constitution of the United States.

Assignments of Error II, IX.

6. The petition contained no adequate description of the land to be taken, nor did it disclose whether the corporeal property or an easement was to be acquired, and for this reason the proceeding was contrary to the 14th Amendment and to Article III, Section 2, paragraph 1, and Article IV, Section 2, of the Constitution of the United States.

Assignments of Error I, II, XIV, XVI.

7. The extent of the land appropriated was in excess of that sought in the petition and authorized by the Federal Power Commission.

Assignments of Error XIII, XVI.

8. The court erred in instructing the jury that the Electric Co. were seeking only an easement, and that appellant would retain all rights and privileges incident to ownership not inconsistent with an easement.

Assignment of Error XIV.

9. The court erred in permitting the Chelan Electric Co. to file a bill of particulars after a motion for a bill of particulars had been denied, and after the order for public use and necessity had been entered.

Assignment of Error XII.

10. The court erred in refusing to find that the instructions to the jury granted, were argumentative and conflicting, and in refusing to grant the instructions prayed by appellant.

Assignment of Error XV.

11. The statutes of the State of Washington, providing that taxes upon real estate are a lien upon the land one year before they are permitted to be paid, are in conflict with Article III, Section 2, paragraph 1 of the Constitution of the United States.

Assignments of Error IV, VI.

12. The appellant was improperly deprived of her right to have the cause removed to a Federal Court.

Assignments of Error V, X, XI and XII.

Summary of Argument.

1. Sufficiency of the Notice to Constitute Due Process of Law.
   a. No authoritative definition of due process by the court.
   b. Due process involves a full notice of the proceeding and an opportunity to defend.
   c. Extra-official, or casual notice does not constitute due process.
   d. The notice that was given in this case.
   e. The ordinary interpretation of the statute would have required the notice of twenty-four days, but this was shortened by the holding of the Supreme Court of the State of Washington that the notice actually given in the case was sufficient.
   f. The decision of the lower court involved necessarily the holding that the notice and publication of notice, required by the statute, could be given simultaneously.
   g. The lower court treated the statute as though service of the notice became effective the first day of publication.
   h. The statute is either constitutional or unconstitutional, and the time fixed by the statute is either reasonable or unreasonable.
   i. Cases of this court are cited to the effect that the notice uncalled for by the statute is not material.
   j. The length of notice necessary for appellant under the facts of this case discussed with the conclusion that two weeks' notice was not sufficient.
   k. Cases in this court upholding statutes of publication in which the shortest time is four weeks are cited.

l. Process of taxation does not require the same notice required in a suit at law.

m. Whether the statute only required publication once a week for two successive weeks, or such publication for two successive weeks and then ten days' notice, there has been no adequate notice given appellant, either because the statute has not been complied with, or the statute failed to provide a reasonably adequate notice.

2. Whether the Purpose of the Taking Constituted a Public Use.

a. The finding that all electrical energy was to be delivered to the Washington Water Power Co. at the switchboard of the Chelan Electric Company's plant.

b. The Chelan Electric Co. had no transmission lines.

c. It was a producing company generating power for its own profit, without the right or ability on the part of the public to purchase.

d. The meaning of "public use," and the necessity of a right on the part of the public, independent of the mere will or caprice of the owner, to the use of the property.

e. Private property cannot be taken by eminent domain for the private use of another, with the citations from the opinions of this court.

f. The effect of the decision of Clark vs. Nash, and Strickley vs. Highland Boy Mining Co., and the doctrine of special circumstances requiring concessions.

g. There were no exceptional circumstances in this case.

h. The scheme is a commercial one without benefit to the public, and solely for the profit of the Chelan Electric Co.

3. Were the Proceedings Otherwise Defective to the Extent that they failed to Constitute Due Process of Law?

a. The description of the land in the petition, being all of the land owned by appellant, did not advise her of the land to be taken.

b. The description should be as accurate as in the case of a deed of land so that a surveyor could locate the land without extrinsic evidence.

c. After the petition was filed and notice published the element of still water measurement and damages for wave wash and erosion were introduced for the first time into the case.

d. The judgment gave the Chelan Electric Co. an easement of greater extent than was sought in the petition.

e. The instructions granted to the jury were complicated and argumentative, and contradictory, and did not fairly set forth the rules of law governing the condemnation of land.

f. No understandable definition of fair market value is given.

g. The jury were prevented from considering the worth of the land to the petitioner for reservoir or other purposes.

4. Whether the Tax Statutes Are in Conflict with the Constitution of the United States.

a. The lien attaching at the time of assessment in March on taxes not payable until the first Monday of February of the succeeding year, violates the Constitution of the United States.

b. The exception of the statute as to the grantor and grantee was applicable to condemnor and respondent.

c. The reason why the lien did not attach between grantor and grantee.

d. The part played by the tax laws in preventing the removal of the case from the state court to the federal court.

e. The County of Chelan had no interest in the land of appellant, and was not a necessary or proper party.

f. Appellant, being a citizen of the State of Pennsylvania, was entitled to a removal of her case to a federal court, and to deprive her of this right is in violation of the Constitution of the United States, Art. III, Sec. 2, and also the due process clause of the 14th Amendment of such Constitution.

g. The petition showed no interest in Chelan County, no relief was asked with regard to Chelan County, and no judgment was rendered with regard to Chelan County.

h. The interest ultimately taken by Chelan County was only an easement and, therefore, could not not have been affected by the existence of a lien for taxes.

Argument.

1. *Sufficiency of Notice to Constitute Due Process of Law.*

Specification of Assigned Errors Nos. 1, 2 and 3. Assignments of Error I, II, III, VII and VIII.

This court has on many occasions considered the sufficiency of notice to constitute due process of law

within the provisions of the Fourteenth Amendment of the Federal Constitution to the effect that "nor shall any state deprive any person of life, liberty, or property, without due process of law." Munn vs. Illinois, 94 U. S. 123; Davidson vs. New Orleans, 96 U. S. 97; Raymond vs. Chicago Union Traction Co., 207 U. S. 20.

The court has adopted the policy not to define due process of law, but has held that the meaning of the term should be ascertained by the actual process of judicial inclusion or exclusion, as the cases presented for decision require. Davidson vs. New Orleans, 96 U. S. 97; Twining vs. New Jersey, 211 U. S. 78.

The protection of the Federal Constitution applies whatever the form in which the legislative power of the state is exerted, whether by a constitution, an act of legislature, or any act of any subordinate instrumentality. Standard Scale Co. vs. Farrell, 249 U. S. 571.

One of the essential requirements of due process of law, where a court proceeding is involved, is full notice of the proceeding and an opportunity to defend. Standard Oil Co. vs. Missouri, 224 U. S. 270.

Extra official, or casual notice, or hearing granted as a matter of favor or discretion, cannot be deemed a substitute for the due process of law that the Constitution requires. Coe vs. Armour, etc., 237 U. S. 413.

The statute of the State of Washington, Session Laws 1890,: page 295, Sec. 2 (Remington's Compiled Statutes, Sec. 922) provides as follows:

> "A notice stating briefly the objects of the petition and containing a description of the land, real estate, premises or property sought to be appropriated, and stating the time and place when and where the same will be presented to

> the court, or judge thereof, shall be served on each and every person, named therein as owner, encumbrancer, tenant, or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering a copy of such notice to each of the persons or parties so named therein if a resident of the state, * * * In all cases where the owner, or person claiming an interest in such real or other property, is a nonresident of this state, * * * service may be made by publication thereof in any newspaper published in the county where such lands are situated once a week for two successive weeks; * * * and such publication shall be deemed service upon each of such nonresident persons * * *."

The statute is set out in full, Appendix 55.

A notice was issued September 17, 1926, directed to the appellant, and the time of presentation to the court was fixed as October 11, 1926, at nine-thirty A. M. The appellant being a nonresident, no personal service was made, but between September 23, 1926, and October 7, 1926, three publications of this notice were made in a daily paper. The Supreme Court of the State of Washington has held that this was a proper service, and did not violate the Fourteenth Amendment of the Constitution. It is contended by appellant that the law as administered is contrary to due process of law.

There are two distinct things provided by this statute: the first is a notice to be served at least ten days previous to the time of hearing; the second is publication of that notice, once a week for two successive weeks, which is to be deemed service upon a nonresident.

Under the ordinary interpretation of this statute, the publication would have been made for a full two weeks, or fourteen days, from the 23rd day of September, 1926, the first day of the publication, and ending on the 7th day of October, 1926. This would have amounted to service of the notice and then should have followed the ten days fixed by law as the length of the notice. The case should not have been heard before October 17th, 1926, or ten days after complete service of the notice had been made. Service was not made until publication was complete. The service was of a ten days' notice, and no action could be had or hearing fixed before ten days after the last day of the two weeks' publication.

We assume that publication was complete October 7, 1926. After that there were but four days given the appellant to appear and answer, the case being set for October 11th. That time was too short to constitute due process of law under the decisions of this court. Roller vs. Holly, 176 U. S. 398. It is apparent, therefore, that this ordinary and usual interpretation of the statute was not adopted by the court. It would have required a hearing not earlier than the 17th day of October. The date fixed in the notice for the hearing was the 11th of October, and, therefore, the whole proceeding would have been void as not complying with the statute, and for that reason depriving Miss Wick of her property without due process of law. The Supreme Court of the State of Washington could not have failed to find that the law had not been complied with and that jurisdiction to hear the case was lacking in the court of first instance because the appellant had not been brought into court.

But the Supreme Court of the State of Washington rejected this obvious interpretation of the statute and

in citing the statute avoided citing the words "at least ten days previous to the time designated in the notice." From reading the statute as quoted by the court in its opinion it would appear that the legislature had left the length of the notice to the discretion of the court and had only required that it be published once a week for two successive weeks. Indeed, this is what the court said the statute meant.

The language used by the Supreme Court of the State of Washington is as follows:

> "Under the statute requiring publication once a week for two successive weeks, the fact is that notice was so published for three successive weeks. The real question here is that of reasonable notice to a nonresident and opportunity to be heard."

And again:

> "Our statute says nothing whatever about a return day, but only the number of publications of notice, where publication must be had. The return day not being regulated by statute as was the case in Roller vs. Holly, *supra*, it is fixed independently of it, so that the question in this case is, was the eighteen days' notice that was actually given, that is, the time that elapsed from the date of the first publication of the notice and the return day, unreasonably short under the provision of the Constitution?

While it seems incredible that the Supreme Court of the State of Washington could have failed to realize that the statute did fix the length of the notice, and that it was not dependent upon the discretion of the court, we submit that its opinion speaks for itself.

While it is true that the statute did not fix a technical "return day," it did provide for a ten days' notice before the day fixed for hearing. The conclusion is inevitable that the ten days of the notice and the two weeks of publication might run concurrently. This is what the Supreme Court of the State of Washington holds that the statute means.

The Supreme Court of the State of Washington has treated the statute in question as though the service dated from the first day of the publication and all that was necessary was that a reasonable time should be given to nonresidents within which to appear. In other words, they have held that the statute only required publication once a week for two successive weeks, which might be satisfied by a publication on two days, eight days apart, and a hearing not earlier than ten days from the first publication. In its opinion the court said:

> "Other than the matter of the description of the property hereinbefore discussed, the argument is that the two weeks' publication of notice provided for by statute is unreasonably short to constitute due process of law. A great number of authorities are cited by each side upon this important point. They have been examined but we do not find it necessary or practical to cite or discuss all of them. Counsel for the relator has called attention to authorities deciding the number of publications and intervening time necessary to satisfy a statute requiring publication for a given number of successive weeks. But that is not the question here where under the statute requiring publication once a week for two successive weeks, the fact is that notice was so published for three successive weeks. The real question here is that of reasonable no-

tice to a nonresident and opportunity to be heard. The case nearest in point cited, quoted from and apparently relied on by this relator is Roller vs. Holly, 176 U. S. 398, 44 L. Ed. 520. In that case it was held that a nonresident defendant who was called upon to answer a suit pending in Texas, while he himself was in Virginia, within five days of date of service of citation, was not furnished due process of law. That is, the time under the circumstances was unreasonably short. But we may and of course do agree with that case and still it does not lead to the striking down of our statute that is complained of nor to a holding that the notice in the present case was unreasonably short. Counsel argues, as we understand, that because our statute speaks of two weekly publications, that it means eight days' notice and that that length of time under the circumstances in this case does not furnish due process of law under the doctrine of the Roller case. That case speaks of the date of service with relation to the return day. Our statute says nothing whatever about a return day, but only the number of publications of the notice where publication must be had. The return day not being regulated by statute, as was the case in Roller vs. Holly, *supra*, it is fixed independently of it, so that the question in this case is, was the eighteen days' notice that was actually given, that is, the time that elapsed from the date of the first publication of the notice and the return day, unreasonably short under the provision of the Constitution?"

We see nothing in the statute which fixed eighteen days as the length of notice to nonresidents; we see nothing in the statute which leaves to the discretion of the court the amount of time of such notice; we see

nothing in the statute which says that the length of publication shall be the length of notice to which nonresidents are entitled. The statute is positive and unambiguous in that it fixes the amount of notice at least ten days, and the time of publication of such notice as once a week for two successive weeks. Since the Supreme Court of the State of Washington has held that the nonresident is not entitled to the two weeks and the ten days consecutively, the amount of notice fixed by the statute is either ten days, or a publication once a week for two successive weeks. Neither ten days' notice nor a publication twice in successive weeks, we confidently assert, constitute due process of law.

The point made by the Washington court, viz., that eighteen days' notice had actually been given is not controlling. It is not what notice was given irrespective of the provisions of the statute, but what notice appellant was entitled to under the statute which will determine whether due process of law was secured to appellant.

The Chelan Electric Co. argues that eighteen days' actual notice was given, and that regardless of what the statute required, eighteen days would be sufficient to constitute due process of law, and as part of this argument it is implied that, even if the statute provided for a shorter notice, and for that reason was unconstitutional, the fact that eighteen days' notice was actually given would cure the defect.

The Supreme Court of the State of Washington upheld this contention (R. 146), and said:

> "The return day not being regulated by statute as was the case in Roller vs. Holly, *supra*, it is fixed independently of it so that the ques-

> tion in this case is, was the eighteen days' notice that was actually given, that is, the time that elapsed from the day of the first publication of the notice and the return day, unreasonably short under the provision of the Constitution?"

Answering this contention, we assert that the statute is either constitutional or unconstitutional. If unconstitutional, by reason of the fact that it does not provide a sufficient notice, it is wholly void and affords no ground for service by publication, and hence the proceedings taken under the void statute are entirely irregular and did not constitute due process of law. If there was no constitutional statute authorizing the Chelan Electric Co. to proceed against Miss Wick, a nonresident of the State of Washington, by publication, for the reason that the notice provided in the existing statute of the State of Washington pertaining to such publication, is unreasonable and arbitrary, then although they published a notice once a week for a year no service upon the person of Miss Wick could be obtained.

No litigant, no judge, no court can make a void law valid by doing something which the void law does not require, but which if the law did require to be done, would have made the law itself a valid law. In this case there is no service except so far as there was a valid one by publication. If the statute authorizing service by publication does not afford due process of law, then no notice has been given appellant. Suppose the statute had required only two days' notice but actually notice of one complete month had been given. Certainly it cannot be contended that a statute is made valid by the fact that its provisions are ignored and a more liberal notice, not required by the statute, has

been given. This court has forever settled that contention. In the case of Roller vs. Holly, *supra*, it said:

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

In Louisville, Nashville R. Co. vs. Stockyards Co., 212 U. S. 132, it was said:

> "The law itself must save the parties' rights and not leave them to the discretion of the court as such."

In Security Trust Co. vs. Lexington, 203 U. S. 233, it was said:

> "It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided by the statute."

And in Coe vs. Armour Fertilizer Works, 237 U. S. 413, it was said:

> "Nor can extra-judicial or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires."

In Southern Railway Co. vs. Simon, 184 Fed. 959, it was said.

> "But it is fundamental that the method of citation should be fairly calculated to bring home to the defendant actual notice of the pendency of the action and allow him a reasonable time to put in his defense."

In sustaining the service on appellant and in construing its statute as it did to require, so far as a non-resident land owner was concerned, no notice or service other than a publication of notice once a week for two successive weeks, which publication could be made simultaneously or concurrently with the ten days' notice, the Supreme Court of the State of Washington has made it possible to have a valid service of process for hearing by giving a notice of ten days, publishing it twice at an interval of eight days within the ten days, and having the hearing either at the expiration of ten days from the first publication of the notice, or at most at the expiration of fourteen days from the first publication of the notice. Under the decisions of this court we do not believe that this amounts to due process of law.

What is, or what is not, due process of law is, in part, dependent upon the facts of each case, and the facts of the case at bar are such as to have required a considerable time by way of notice for these reasons: The land was a large tract of which only a very small portion was affected by the condemnation proceeding; the petition described the entire tract of twelve hundred acres, and only described the part to be taken by reference to a maximum elevation of the water of the lake to 1,100 feet above mean sea level;

There were several serious questions of fact and of law presented, which required investigation and study before a reasonable defense could be undertaken. According to the admission of the Chelan Electric Co. (R. 85) the trial involved a large amount of expert testimony, including experts on the question of erosion of the soil due to wave wash, the expense of constructing docks to meet the new conditions upon the

lake, and the value of the land affected by the enterprise of the petitioner;

To have ascertained what portion of this land was to be taken or affected required the establishment of a datum plane, and the engineering incident to a topographical survey of the tract; there were consequential damages to the remainder of the property not taken which were the result of the taking;

The defendant resided in the city of Philadelphia, entirely across the continent from where the land was located; it was a journey of five days between her home and the City of Wenatchee, where the property was located and where the court met. She was a citizen of the State of Pennsylvania, and under the Constitution and statute was entitled to have this case transferred to a Federal Court. Some preparation was needed for a trip of this character, and consultation with counsel and experts was reasonably necessary before undertaking the defense of such a proceeding. The removal of the cause to the Federal Court required the preparation of a petition, giving of bond, and notice to the Chelan Electric Co. of the application for removal. In condemnation cases the petitioner has always had a long period of time in which to prepare for the bringing of the suit, and a respondent can by no means meet him on equal terms where his appearance in court is summarily ordered in ten days, and at a distant place. Even if personal service had been made upon her in Philadelphia, ten days before the day fixed for the hearing, the time was too short to be reasonable, but here no personal service was made, and in lieu thereof a publication of notice was substituted.

Some slight reviewing of the decision of this court develops the following holdings:

In the case of Huling vs. Kaw Valley R. & Improvement Co., 130 U. S. 559, the court upheld a statute providing for publication thirty days before the time fixed for hearing in a suit to condemn land.

In the case of Ballard vs. Hunter, 204 U. S. 241, in a suit to enforce collection of levee taxes, it was held that four weeks' notice by publication was adequate.

In House vs. Road Improvement District, 266 U. S. 175, the court found that the statute which allowed twenty-eight days after first publication within which a land owner might object to assessment of benefits was valid.

In Security Savings Bank vs. California, 263 U. S. 282, the court held that publication of notice to a depositor in a bank, whose account had not been added to or drawn on for twenty years, for four weeks was a sufficient notice.

In Hamilton vs. Brown, 161 U. S. 256, this court held that due process of law had been given in an escheat proceeding where publication was made under the statute for four weeks.

In the case of McDaniel vs. McElvy, 91 Fla. 770, 51 A. L. R. 731, the court had under consideration a statute providing for notice once a week for four consecutive weeks in a suit to remove cloud from title to real estate. That court in its opinion has cited many cases in upholding such a publication. There seems to be a lack of authorities for any period between the five days in Roller vs. Holly and the four weeks in the above-cited cases. In the conventional civil proceeding the laws of the State of Washington require publication once a week for six consecutive weeks with an answer within 60 days of publication (Rem. C. S., 233).

Suits involving assessment for taxes and notice to creditors in bankruptcy proceedings are not in point,

as the length of notice is necessarily shortened due to the character of the action and the obvious necessity of the case.

This court said in the case of Bell's Gap R. Co. vs. Pennsylvania, 134 U. S. 239, said:

> "The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under eminent domain."

The reasoning in the case of Roller vs. Holly, *supra,* seems to apply very strongly to the case at bar, the court there saying:

> "That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice, there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever unless such notice were reasonable and adequate for the purpose."

The court then, after commenting upon the fact that an ordinary summons contemplates that the party served may have other business of equal or greater importance engaging his attention, or may require time for the retainer of counsel and preparation of his defense, states that there is a consensus of opinion in the statutes of several states which is entitled to great weight in passing upon the question of the reasonableness of such notice, and after reviewing the statutes of many states, proceeds to say:

> "It may be said in general, with reference to these statutes that in cases of publication notice is required to be given at least once a week for from four to eight weeks, and in case of personal service out of the state, no notice for less than twenty days between the service and the return day is contemplated in any of the states except Mississippi, where a personal notice of ten days seems to be sufficient."

In the case of Wuchter vs. Pitzzutti, 276 U. S. 13, this court had under consideration a statute, which it declared denied due process of law, because it failed to contain a provision making it reasonably probable that notice of service on the Secretary of the state would be communicated to a nonresident defendant, and the court cited with approval the case of McDonald vs. Mabee, 243 U. S. 90, which calls attention to the fact that the foundation of jurisdiction is physical power and says:

> "And in states bound together by a Constitution and subject to the 14th Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact."

What were the probabilities with regard to a publication in the City of Wenatchee, Washington, giving notice to Miss Wick of the proceeding affecting her property? If the first issue of the newspaper containing the publication had been at once mailed to Miss Wick, she would not have received it in the ordinary course of mail until the sixth following day, and then, if she had immediately left home and journeyed with all speed to Wenatchee she would not have reached there until the tenth day, not having sufficient time to

have secured counsel and prepared for defense. Furthermore, by the requirement of more than one publication in the newspaper, the legislature had in mind the possibility that the first publication would escape the attention of the land owner, and that Miss Wick would not receive notice of the proceeding until the second publication had been made, and then it was wholly too late for her to have presented herself in court within the fourteen days allowed.

There is one other matter deserving attention in this connection and that is the provision of the statute of the State of Washington which reads, "such publication shall be deemed service upon each of such nonresident person, or persons, whose residence is unknown." This was not cited by the Supreme Court of the State of Washington in its quotation of the statute, and seems to have escaped the attention of that court. The natural inquiry at once presents itself, service of what? It seems clear that it means service of the notice of ten days provided in the preceding portion of the section and thus, service became effective only at the expiration of the publication.

This court has held in the case of Early vs. Homans, 16 How. 610, construing a statute requiring publication of notice in a newspaper, as follows:

> "The proposition 'for,' means of itself duration when it is put in connection with time, and as all of us use it in thtat way in our everyday conversation, it cannot be presumed that the legislator, in making this statute, did not mean to use it in the same way. Twelve successive weeks is as definite a designation of time, according to our division of it, as can be made.
>
> When we say that anything may be done in twelve weeks, or that it shall not be done for

> twelve weeks, as the happening of a fact which is to precede it, we mean that it may be done in twelve weeks, or eighty-four days, or, as the case may be, that it shall not be done before."

This case was also considered and the doctrine approved in the case of Leach vs. Burr, 188 U. S. 510. See also the Appeal of Fred W. Meyer, 158, Minn. 433; Market Natl. Bank vs. Pacific Natl. Bank, 89 N. Y. 397; Cox vs. Northern Wisconsin Lumber Co., 82 Wisc. 141; Foster vs. Vehmeyer, 133 Calif. 459; Auerbach vs. Maynard, 26 Minn. 421; Bond vs. Penna. R. R. Co., 124 Minn. 195; State vs. Morrison, 132 Minn. 454.

Whether we take the view adopted by the Supreme Court of the State of Washington that the statute only required publication once a week for two successive weeks and no further notice, or the interpretation that the statute required publication for two successive weeks (fourteen days) and this would constitute service of a notice which was then to run for ten days, the appellant has not received reasonable notice of the pendency of the proceeding and an opportunity to appear in the cause, and has therefore, been deprived of her property without due process of law. If the longer term is fixed by statute, appellant has been deprived of due process by the failure of the court to observe the statute. If the shorter term is fixed by the statute, then the term fixed by the statute of ten days, or fourteen days, does not constitute due process of law, under the facts of this case.

In the case of Chicago R. Co. vs. Chicago, 166 U. S. 226, this court said:

> "But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within

> the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This court, in referring to the 14th Amendment, had said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application, where the invasion of private rights is effected under the forms of state legislation!' "

Appellant submits that the question before the court is not whether eighteens days' notice is a reasonable one, but whether the statute of the State of Washington as interpreted by the Supreme Court of that state and upheld in this case, providing as it does for a notice of only ten days to be published once a week for two successive weeks, is a reasonable notice to her living as she did at such a distance from the court.

2. *Whether the Purpose of the Taking Constituted a Public Use.*

Specification of Assigned Errors, Nos. 4 and 5. Assignments of Error II and IX.

One of the findings of fact to which attention has heretofore been called was as follows: "The electric energy to be generated in the new plant will be delivered to the Washington Water Power Co. at the switchboard of said new plant for transmission by the Washington Water Power Co. to its customers in the State of Washington" (R. 56).

From this it is apparent that the Chelan Electric Company is not to have any customers of its own except the Washington Water Power Co. All of its generated electric energy is to be disposed of by it under contract to the Washington Water Power Co. If the public desires to obtain any benefit from this development of water power, it must do so as customers of the Washington Water Powre Co. and not as customers of the Chelan Electric Company. The question at once suggests itself, is the Chelan Electric Company condemning this land for a public use, or for its own profit derived from sale to the Washington Water Power Co.? The Chelan Electric Company has no transmission lines but is delivering the products on its own premises "at the switchboard of said new plant," much after the manner of a cash and carry merchant. Those who desire to obtain power from the Chelan Electric Company must be situated as the Washington Water Power Co. is with a transmission line. To obtain such a transmission line the permission of the state would have to be obtained, and even if the state would grant such permission, any number of transmission lines of users of electricity would shortly create a public nuisance. Furthermore, the cost would be prohibitive to any ordinary customer. It is, therefore apparent that any right on the part of the general public to utilize the current generated by the Chelan Electric Company is illusory and non-existent.

We have, therefore, the case of an electric power producing company generating power to be disposed of to another corporation for its own profit, and under such conditions that the general public cannot avail itself of the right to purchase power from such producing power company. It goes without saying that there will be a profit to the Chelan Electric Company

paid by the Washington Water Power Co. The question presented in the case is, does a condemnation of land by the electric power producing company, under these circumstances, amount to a taking of the land for a public use or the taking of land for its own private use. The record discloses no way in which the public can use the power produced except by purchasing the same from the Washington Water Power Co. In purchasing this power the general public must pay rates which will allow the Washington Water Power Co. a fair return on its investment including the capital invested in six other power stations, and it must also pay a separate and distinct profit upon the same electric energy for the benefit of the Chelan Electric Company. The rates to consumers will not be based upon the cost of the power to the Chelan Electric Co., including a fair return on its investment, but will be based on the cost to the Washington Water Power Co.

We feel that the court will take judicial notice of the fact that the creation of controlled producing companies and other corporations holding the stock of such controlled companies, is a common device for increasing the profits to the ultimate owner of the stock, not for the benefit of the public.

The Chelan Electric Company and the Washington Water Power Co. were two distinct and separate corporations, and while the Chelan Electric Company has been chartered in the State of Washington as a public service corporation, the finding of fact made by the court when analyzed, indicates that this was merely a cloak that it has assumed, and that its real purpose is not to engage in business as a public service corporation but as a corporation serving exclusively one customer for its own private profit and advantage. This is clearly demonstrated by the finding of fact made in

the cause with reference to the Washington Water Power Company which was not a party to the proceeding and with regard to which there need have been no finding of fact (R. 54-56).

We deem it conclusively shown that the Chelan Electric Company did not intend to serve the public at large by the finding of fact that all deliveries of its generated current were to be made at its own switch board, it lacking entirely any facilities for delivering electric current to the general public.

While there is some difference among the authorities as to whether the term "public use" in the law of eminent domain, means use by the general public, or is equivalent to public benefit, convenience or welfare, there is a strong weight of authority that to make the use a public one, for which the power of eminent domain may be exercised, there must be a right on the part of the public, independent of the mere will or caprice of the owner, to the use of the property.

In Shasta Power Co. vs. Walker, 149 Fed. 568, it was stated to be the law that to entitle a private corporation to exercise the special right of eminent domain the use which formed the basis for the application therefor must be such as would subserve the public in some appreciable way, and be such as it might demand in service as of right, and that it was not sufficient that contemplated improvement would operate as a benefit to the community or property holders thereof, but the service proposed must be such that every individual member of the community similarly situated shall have the right to demand and receive upon like condition as any other member. The Circuit Court of Appeals affirmed the judgment in this case, 160 Fed. 856.

The law as announced in the State of Washington is to the same effect. State vs. White River Power Company, 39 Wash. 648; 4 Ann. Cas. 987. The Court cites with approval the following extract from Lewis on Eminent Domain, Sec. 165:

> "Public use means the same as use by the public, and that, it seems to us, is the construction the words should receive in the constitutional provision in question."

In harmony with this rule are the cases of Gravelly Ford Canal Co. vs. Pope & T. Land Co., 136 Cal. App. 556; Sholl vs. German Coal Co., 118 Ill. 427, 59 Am. Rep. 379; Cleveland, C. C. & St. L. R. Co. vs. Polecat Drainage District, 213 Ill. 83; Great Western Natural Gas Co. vs. Hawkins, 30 Ind. App. 567; Howard Mills Co. vs. Schwartz Lumber Co., 77 Kan. 599, 18 L. R. A. (N. S.) 356; Chesapeake Stone Co. vs. Moreland, 126 Ky. 656, 16 L. R. A. (N. S.) 479; Arsnkerger vs. Crawford, 101 Md. 247, 70 L. R. A. 497; Board of Health vs. Van Hoesen, 87 Mich. 533, 14 L. R. A. 114; Minnesota Canal & Power Co. vs. Koochiching Co., 97 Minn. 429, 7 Ann. Cas. 1182; In re Eureka Basin Warehouse & Mfg. Co., 96 N. Y. 42; In re New York, 135 N. Y. 253, 31 A. S. R. 825; Jacobs vs. Clearview Water Supply Co., 220 Pa. 388, 21 L. R. A. (N. S.) 410; Borden vs. Trespalacios Rice & Irrig. Co., 98 Tex. 494, 107 A. S. R. 640 (affirmed without opinion 204 U. S. 667); State ex rel. Harris vs. Superior Ct., 42 Wash. 660, 7 Ann. Cas. 748; Hench vs. Pritt, 62 W. Va. 271, 125 A. S. R. 966, and cases cited in monograph note 54 A. L. R. 7.

Attention of the Court is called to a well written monographic note on the subject "Uses for Which the Power of Eminent Domain Can Not Be Exercised," 102 A. S. R. 809.

This Court has recognized the rule that property of an individual cannot be taken by eminent domain for the private use of another.

In Charles River Bridge vs. Warren, 11 Pet. 420, it was said:

> "Although the sovereign power in free governments may appropriate all the property, public as well as private for public purposes making compensation therefor, yet it has never been understood, at least never in our republic, that the sovereign power can take the private property of 'A' and give it to 'B' by the right of eminent domain, or that it can take it at all except for public purposes."

In Kaukauna Water Power Co. vs. Green Bay, etc., Canal Co., 142 U. S. 254, this Court said:

> "Upon the other hand, it is probably true that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain."

And in the case of Missouri Pacific Ry. Co. vs. Nebraska, 164 U. S. 403, the opinion states:

> "To require the railroad company to grant to the petitioners a location on its right of way for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company against its will, to transfer an estate in part of the land which

> it owns and holds, under its charter as its private property, and for a public use, to an association of private individuals for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit. * * *"

This Court also by affirming without an opinion the case of Borden vs. Trespalacios Rice & Irrig. Co., 98 Tex. 494, seems to have given its approval to that decision in which it is said:

> "Any citizen, whose property is sought to be taken in aid of a given enterprise is to have a hearing in which the question of whether or not the use to which the property is to be devoted is a public one, may be fully considered, and if it be found that such is not a character of the use, the statute does not authorize, and the Constitution forbids the taking."

In the case of Hendersonville Light & Power Co. vs. Blue Ridge Interurban Railway Co., 243 U. S. 563, and the case of Mount Vernon-Woodbury Cotton Duck Co. vs. Alabama Interstate Power Co., 240 U. S. 30, the Court has indicated that if the use was private the taking would be void.

The case of Clark vs. Nash, 198 U. S. 361, does not depart from this rule except to the extent of pointing out that the test of the use by the general public is an inadequate test where special circumstances exist which require some concessions from the otherwise inflexible rights of individuals. The Court was careful to assert that it did not desire to be understood as approving the broad proposition that private property may be taken in all cases where the taking might promote the public interest, or develop the natural resources of the State.

In Strickley vs. Highland Boy Mining Co., 200 U. S. 527, was presented a case of circumstances exceptional in character, which required concessions from individuals which, under other circumstances, they would not be required to make, as did also the case of Hairston vs. Danville & W. Ry. Co., 208 U. S. 598.

There were no exceptional circumstances in this case. If the land had been sought to be condemned by a public service corporation which proposed to furnish its electric energy to all persons desiring to purchase it, so that a right existed in each member of the public to demand service for all purposes, there would be no objection to the condemnation on this ground.

A consideration of the facts found by the Court indicates that the Washington Water Power Co. when it purchased this electric energy from the Chelan Electric Company intended to transmit it into the State of Idaho, notwithstanding the contrary conclusion of the court of Chelan County.

It is found as a fact that the Washington Water Power Co. sold in Idaho, during the period from July 1st to December 1, 1926, 54,800,000 kilowatt hours, and its plant, located in Idaho, had generated and sold during the same period, 17,600,000 kilowatt hours (R. 56). During the twelve months period in the year 1925, it sold in Idaho approximately 114,000,000 kilowatt hours, and during the twelve months period in the year 1926, it sold in Idaho 128,600,000 kilowatt hours. During the twelve months period in the year 1925, it generated in Idaho 48,650,000 kilowatt hours (R. 57). What was used in Idaho in excess of production in that State came from plants in the State of Washington. The Washington Water Power Co. contemplates selling electric energy necessary for the operation of a zinc

plant in Northern Idaho, which when constructed will consume 80,000,000 kilowatt hours during a calendar year (R. 56). There is no finding of fact as to how much electricity will be generated by the plant of the Chelan Electric Co. from the project for which this land is taken, and it is a fair assumption that the purpose of the new development by the Chelan Electric Co., was to furnish this electric energy. The Washington Water Power Co.'s transmission lines were all connected together, and there appears to have been a free flow of electric energy from the State of Washington into the State of Idaho. The only increase in production facilities shown was this plant of the Chelan Electric Co. Simultaneously with the erection of this plant there is a demand for an additional 80,000,000 kilowatt hours to operate a zinc plant in Idaho.

It is submitted that sale outside of the State of Washington is not a public use for which the power of eminent domain could be exercised under the authority of that State.

In no case which has been found by counsel in their examination has it been decided that a corporation can condemn land for the purpose of generating electricity, all of which it has contracted to sell an individual subscriber, and none of which can be utilized by the public by a direct purchase from the condemning corporation, but only by purchase from its vendee after the payment of the tax or toll levied, by reason of the existence of the two separate corporations. The viciousness of this is obvious.

The scheme involved is a commercial one without benefit to the public, in which the public can not participate, and which produces a profit to the Chelan Electric Company, and through the added profit to be

paid to the Chelan Electric Company, is to the disadvantage of the public. Each time a holding company, distributing company, operating company or a producing company is inserted in the progress of the development of water power into electric energy, between the water fall and the electric motor, the cost to the ultimate consumer is increased.

3. *Where the Proceedings Otherwise Defective to the Extent That They Failed to Constitute Due Process of Law?*

Specification of Assigned Errors Nos. 6, 7, 8, 9 and 10. Assignments of Error I, II, III, XII, XIII, XIV, XV and XVI.

We urge these assignments of error in view of the Act of February 13, 1925 (43 Stat. 936), providing that the writ of error to the highest court of a state shall have the same effect as if the judgment or decree had been rendered or passd in a court of the United States (Sec. 237a), and that a proceedings by way of writ of error (appeal) instead of by certiorari, shall not be dismissed upon this ground, but shall be regarded and acted upon as a petition for certiorari (Sec. 237c).

The land described in the petition comprised all of the entire holding of land of Miss Wick in Chelan County, the vastly greater portion of which was unaffected by the condemnation proceeding, and she was left to determine, without any guide or aid from the petition, which portion of her land they sought to condemn, other than the indefinite statement that it was necessary to raise the waters of Cheland Lake and the Chelan River to a maximum elevation of 1,100 feet above mean sea level, and to inundate her land to this

maximum elevation. The statute (Appendix 55) required "a description of the land" sought to be appropriated. There was a flagrant disregard of this statute in the petition. This defect was jurisdictional and was not cured by the refusal of the court to make it more definite and certain when Miss Wick applied by motion to that end (R. 39, 42), or by a bill of particulars filed after the determination of public use and necessity had been made (R. 75). A bill of particulars is no part of a petition or pleading and therefore could not cure the defect of inadequate description in the petition. Duval vs. Duval, 29 Wash. 528.

The order to make more definite and certain of March 23, 1927, was not made with reference to case No. 7391, which was the case relating to appellant's land, as will appear from the order (R. 43).

It would seem to be a fundamental requirement of due process of law that the land owner would be advised from the filing of the petition just exactly what portion of his land was sought to be taken from him for public use. The description should be as accurate as that required in the case of a deed of land. It should be sufficiently accurate to enable a surveyor taking the description to locate the parcel described without the aid of extrinsic evidence. (Nichols on Eminent Domain, Sec. 399.)

In the case of State *ex rel.* Oregon vs. Superior Court, 45 Wash. 321, the Supreme Court of the State of Washington has recognized the well-settled rule that where land has not been described with reasonable certainty the court acquires no jurisdiction in the condemnation proceeding.

In the case of State *ex rel.* Patterson vs. Superior Court, 102 Wash. 331, the court said:

> "Petitioner should be required to describe the land sought to be appropriated with all the certainty that is possible, in order to determine the land appropriated and condemned by actual survey. It is necessary also, in order that a jury of condemnation may know how much land is appropriated and to be paid for."

Where lands are to be taken or covered with overflow of water, it is entirely practicable to describe them accurately by metes and bounds. *In re* Roe, 111 N. Y. S. 755; City of Helena vs. Rogan, 26 Mont. 452, 68 Pac. 728.

To the effect that the description must be given with such reasonable certainty that a surveyor can locate the land without extrinsic evidence, see also 2 Lewis on Eminent Domain (2d. Ed.), Sec. 307, and cases cited: People *ex rel.* Eckerson vs. Haverstraw, 137 N. Y. 88; Lexington Print Works vs. Canton, 167 Mass. 341.

After the petition was filed, it developed that the petitioner was seeking something that had not been mentioned in his petition, namely, that the elevation of 1,100 feet was to be at the time of still water, and in addition to the right of flowing to this height at still water measurement, there was to be imposed upon the land owned by appellant an additional servitude arising from wave wash and erosion of the land at times when the surface of the lake was disturbed and the water kicked up by the wind.

Accordingly, although no mention thereof was made in the petition, the judgment on the verdict (R. 127) conferred upon the Chelan Electric Company "the right in perpetuity to inundate and overflow by impounding the waters of Lake Chelan and the Chelan River, and raising the same to the maximum elevation

of 1,100 feet still water measurement, above mean sea level, and to damage the land herein described, and all lands of the respondent, Alice Barbee Wick, lying contiguous or adjacent thereto, by wave wash, erosion, seepage, inundation, or any similar cause, as a result of holding the waters to said elevation."

This was also in excess of any right granted by the Federal Power Commission under whose license the Chelan Electric Company claimed to be acting (R. 157). The case presented to the jury of condemnation was not the case set up in the petition filed. To award the taking of land not called for in the petition is a taking without due process of law.

The instructions to the jury granted by the court, thirty-seven in number, were long, complicated and argumentative, and did not fairly set forth to the jury that the land owner was entitled to the fair market value of his property for the best use for which it was available.

In Instruction No. 6 the jury were advised that the Chelan Electric Company had already acquired, through purchase, the major portion of the property necessary for the power development (R. 101).

In Instruction No. 7 the jury was told that the petitioner was not seeking a fee simple title but only an easement to overflow and inundate the land to an elevation of 1,100 feet above mean sea level, and that the owner would retain all rights and privileges incident to ownership of real property not inconsistent with this right (R. 102).

In Instruction No. 16 the jury was charged that the petitioner sought to inundate to an elevation of 1,100 feet still water measurement, together with the right to damage the respondent's land by wave wash, erosion, seepage, etc. (R. 104). These are contradictory.

In Instruction No. 17 the jury was told that "it is not intended that compensation shall extend to loss or injury which the land owner did not have at the time of taking." Yet this was the case of an easement, and the loss or injury to be compensated for was in part the loss by reason of the flooding of the land with water that had yet to take place.

No understandable definition of "fair market value" was given, nor were the jury told that the payment should be ascertained with regard to the best use for which the land was available.

Instructions Nos. 19, 20, 21, 22 and 23 reiterated the point of view of the Chelan Electric Company in slightly different language, and were apt to convey to the jury the idea that the court favored the contention of the petitioner.

Instructions Nos. 18 and 24 repeat the same idea as to a forced sale, but Instruction No. 24 gives a wholly wrong statement of the law when it says: "In no event can you consider the evidence based on the storage capacity of the lake, or what it may be worth to the petitioner for reservoir or other purposes." We respectfully submit that the storage capacity of the lake was a decisive element of the value of the land to be taken.

Both Instructions No. 31 and No. 33 contain a statement that the jury may disregard the evidence of any witness who has sworn falsely in the case. There could be no possible excuse for two instructions on this point.

On the other hand, instructions offered on behalf of the respondent (R. 96) set out adequately the law in the case and should not have been refused.

These several items of error considered under this portion of our brief show that appellant did not have

accorded to her the impartial decision of substantial questions raised in the case, and the benefit of a decision of a jury directed impartially, and acting upon the petition to which appellant was made a party; and we submit that she was thereby denied her rights under the Federal Constitution.

4. *Whether the Tax Statutes Are in Conflict with the Constitution of the United States.*

Specification of Assigned Errors Nos. 11 and 12. Assignments of Error IV, V, VI, X, XI and XII.

The appellant also attacks the validity of the statute providing that taxes upon real estate are a lien upon the land for one year before they are permitted to be paid. Under the law, taxes assessed upon real property were a lien thereon from and including the first day of March in the year in which they were levied (in this case 1926) until the same were paid, but as between grantor and grantee such lien shall not attach until the first Monday of February of the succeeding year. The County Treasurer is prohibited from collecting taxes or issuing receipts for the same before the first Monday of February following the year in which they are assessed. Therefore, at the time the proceedings were instituted an assessment of taxes against the land had been made for the year 1927, which became a lien the first day of March, 1926, but which could not have been paid before the first Monday of February, 1927, and which, as between grantor and grantee, would not attach to the land until the first Monday of February, 1927.

The law of the State of Washington providing for the payment of taxes is as follows:

"The assessment year contemplated in this chapter shall commence on the first day of March and end on the last day of February in each year and the fiscal year contemplated in this chapter shall commence on January first and end on December thirty-first of each year. "* * * The amount of said tax due upon such books shall be charged to the treasurer in an account to be designated as treasurer's 'Tax-roll Account' * * * Provided, that the county treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such tax upon said assessment-rolls before the first Monday of said February following. * * *

"The taxes assessed upon real property shall be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the first Monday of February of the succeeding year. * * *"

The whole purpose of condemnation was to effect a change of title from Miss Wick to the Chelan Electric Company. An estate in lands was to pass by alienation from Miss Wick to the petitioner, and a privity of estate necessarily existed between them when this was effected. While it was an involuntary conveyance, it was a conveyance nevertheless, and if the proceeding was being lawfully conducted it would result in the alienation of title from appellant and the acquiring of title by appellee. A proceeding to condemn land is in substance a proceeding to compel a sale between owner to petitioner. Atlanta, etc., R. Co. vs. Southern R. Co., 131 Fed. 657. Certiorari denied, 195 U. S. 634.

In the case of Manion vs. Louisville, etc., R. Co., 90 Ky. 491, it was said:

> "The owner may become, and is in fact made, the involuntary vendor of his land under the exercise of this sovereign power."

The reason why the statute provided that the lien was not to attach as between grantor and grantee until the first Monday of February of the succeeding year is evident. It was to require the payment of the taxes by the one who was the owner of the property at the time when the payment became payable. In a settlement between grantor and grantee before the first Monday of February, 1927, no deduction of the purchase price would be made by reason of the lien of the taxes, but in such settlement after the first Monday of February. 1927, there would have been such deduction because as of that date the lien had attached. So in a condemnation proceeding in award for damages for the land taken, nothing could have been lawfully deducted from the amount awarded to Miss Wick by reason of this lien prior to the first Monday of February, 1927, on which date the lien attached to her land for purposes of conveyance. If appellant had granted her land to the Chelan Electric Company no lien for taxes would have existed; why should there be a lien in case of condemnation?

The part these laws with relation to the assessment of taxes, and making them a lien on real estate, played in the case was this: The appellant filed a petition for the removal of the cause to the District Court of the United States for the Eastern District, Washington, gave bond and served due notice upon the attorneys for the petitioner. The court of Chelan County, notwithstanding the objection made by petitioner to the removal, signed an order removing the case as prayed (R. 25).

Thereupon, the Chelan Electric Company moved to remand the cause, filing therewith affidavits of various persons. The principal ground of this motion was that taxes assessed against the land were a lien upon it in favor of Chelan County, and that Chelan County was therefore a necessary and indispensible party. This contention was sustained by the Supreme Court of the State of Washington in its opinion (R. 145), where it says:

> "The relator, Alice Barbee Wick, is, and was, a resident of Philadelphia, Pennsylvania, and error is assigned on her behalf to the effect that the County of Chelan was improperly made a joint defendant with her, having the effect, it is claimed, of depriving her of the right to a removal of her case to the federal court on account of diverse citizenship. Two answers may be made: First, at the time the action was commenced general taxes due the county were outstanding and a lien upon the property, and Rem. Comp. Stat., Sec. 921 (P. C. Sec. 7646), requires a petition in eminent domain cases to set forth the name of each and every owner, encumbrancer or other person or party interested in the property, and Rem. Comp. Stat., Sec. 922 (P. C. Sec. 7647), requires that a notice of such petition be served on each and every such person; and, second, the record shows that, prior to the hearing herein by the trial court, relator Wick did remove the case against her to the federal court and, upon a hearing therein, that court promptly remanded the cause to the state court, from which order of the federal court it appears no appeal was prosecuted nor review sought or had."

The court appears to have paid but slight attention to the provision that as between grantor and grantee

such lien should not attach until the first Monday of February of the succeeding year, and the appellant contends that so far as this condemnation proceeding is concerned, between the Chelan Electric Company on one hand, seeking to acquire property through a proceeding in eminent domain, and the appellant, the owner of the property, on the other hand, there exists a relationship which was identical, so far the property to be condemned is concerned, with the conventional relationship that exists between grantor and grantee, and that, therefore, under the provision of the law in question, there is no lien upon the property on the date the petition was filed, and the Chelan County was not necessary, indispensible or even a proper party to the proceeding.

In holding that the County of Chelan was a proper party and properly joined as a defendant with appellant because general taxes due the County were outstanding and a lien upon the property under the law and Rem. Comp. Stat., Sec. 921 (P. C. Sec. 7646) required a petition in eminent domain cases to set forth the name of each and every owner, encumbrancer or other person or party interested, as in the quotation from the decision of the Supreme Court of the State of Washington just cited above, that court has made the tax statutes of the State of Washington conflict with the constitutional rights of petitioner, and has deprived the Federal Court of jurisdiction over cases given to it by the Constitution of the United States, Art. III, Sec. 2, and of which it has jurisdiction under the U. S. Judicial Code, Title 28.

Jurisdiction of Federal Courts because of diversity of citizenship, or the right of removal to a Federal Court, under Constitution, Art III, Sec. 2, and Judi-

cial Code, Secs. 24 and 28, cannot be defeated by joining formal or unnecessary parties.

Salem Trust Co. vs. Manufacturers Finance Co., 264 U. S. 182.

After the proof produced at the hearing held June 23, 1927, and on subsequent days, failed to show any interest in Chelan County, or any reason for it being joined as a party to the proceeding, appellant again presented a petition and bond in open court, copies of which were served on the attorneys for the Chelan Electric Company, and requested the judge at that period of the case to file an order removing the cause to the Federal Court. This was refused (R. 92), and upon the appeal to the Supreme Court of the State of Washington, the matter was considered and the court said:

> "The Federal Statutes, Sec. 29 of the U. S. Judicial Code (Sec. 72, Title 28, of the U. S. Code Ann.) requires that written notice of the petition and bond for removal shall be given the adverse party or parties prior to filing the same. This was not done.
>
> "The application was neither properly nor timely made.
>
> "The Supreme Court of the United States has held that a case arising under the laws of the United States, non-removable on the complaint, when commenced, cannot be converted into a removable one by evidence of the defendant or by an order of the court upon any issue tried upon the merits, but that such conversion can only be accomplished by a voluntary amendment of his pleadings by the plaintiff or, where the case is not removable because of joinder of

defendants, by the voluntary dismissal or nonsuit by him of a party or parties defendant." Great Northern R. Co. vs. Alexander, 246 U. S. 276.

The Alexander case is not controlling of the case at bar. It was a complaint under the Federal Employers' Liability Act in which there was a prohibition against removal, by an amendment approved April 5, 1910. We have not such a case here. This case is one in which the County of Chelan, a wholly unnecessary and improper party, was joined as defendant. The cause should have been removed and should not have been remanded to the State court. It was properly a cause of which the United States courts had jurisdiction under the Constitution of the United States. There was no relief sought against Chelan County; no substantial allegation in the petition relating to it; and there was no reason why it should have been added as a party unless this action was justified by the tax law above referred to. The action of the court in holding it as a party is a finding that the statute made the Chelan County an indispensible party, and if it did so, it is void under the Constitution of the United States.

As we read the decisions of this court, where a wholly unnecessary party has been joined as a defendant in a cause against whom no relief is prayed, he will be disregarded. Barney vs. Latham, 103 U. S. 205; New Jersey Central R. Co. vs. Mills, 113 U. S. 249; Coney vs. Winchell, 116 U. S. 227; Geer vs. Mathieson Alkali Works, 190 U. S. 428; Wilson vs. Republic Iron & Steel Co., 257 U. S. 92; Niles Bement & Pond Co. vs. Iron Moulders Union, 254 U. S. 77.

On its face the petition did not disclose any interest

on the part of Chelan County, and at the hearing no interest was shown to have existed, and in the thirty-seven instructions to the jury nothing was said as to any interest of Chelan County. It is only by a reference to the law making taxes a lien on the land from the date of their assessment that there is any shadow for contending that Chelan County could have been joined in the condemnation proceedings, and when this statute is examined it will be seen that it excludes from the effect of the lien, in terms, transactions between grantor and grantee, until after the taxes may be paid. A petition for removal is not filed too late if it is filed as soon as the case became a removable one. Remington vs. Central Pac. R. R. Co., 198 U. S. 95. If not removable when the first petition of appellant was filed, it became so when the evidence in the case disclosed no interest on the part of Chelan County in the land.

As it is held that Chelan County is a necessary and indispensible party to the condemnation proceeding under the statute of the State of Washington, the appellant submits that the statute requiring this is invalid because it prevents her from removing her cause to the Federal Court which, under the Constitution of the United States, had jurisdiction of the cause, and also deprives her of her property without due process of law, due process of law in such case requiring that she be afforded the opportunity for removal of the case to the proper Federal Court.

But even conceding for argument that the statute created a lien on the land, there is no reason why Chelan County should have been made a party to the condemnation proceeding. Under a prior decision of the Supreme Court of the State of Washington, the

county's lien for unpaid taxes is not a basis for making the county a party to condemnation proceedings in that State. Gasaway vs. Seattle, 52 Wash. 444.

In this proceeding only an easement in a portion of the land was ultimately taken by the Chelan Electric Company. The lien for taxes which attached to Miss Wick's land did not attach to the easement which they sought and which easement was in no way affected by a lien for taxes.

For the reasons set out, we feel that the appellant has been deprived of her property without due process of law, and she accordingly requests that the errors in the Supreme Court of the State of Washington may be corrected, and that the judgment in the cause may be reversed.

Respectfully submitted,

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APPENDIX

Remington's Compiled Statutes of Washington, 1922

SEC. 921. *Eminent Domain by Corporations—Petition, Requisites of.* Any corporation authorized by law to appropriate land, real estate, premises, or other property for right of way or any other corporate purposes, may present to the superior court of the county in which any land, real estate, or premises, or other property sought to be appropriated shall be situated, or to the judge of such superior court in any county where he has jurisdiction or is holding court, *a petition in which the land, real estate, premises, or other property sought to be appropriated shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records,* the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by such corporation, to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such lands, real estate, premises, or other property, or in case a jury be waived, as in other civil cases in courts of record in the manner prescribed by law, then that the compensation to be made, as aforesaid, be ascertained and determined by the court, or judge thereof (Cf. L. '88, p. 58, sec. 1; L. '90, p. 294, sec. 1; 2 H. C., sec. 648).

SEC. 922. *Notice, Contents of and Service.*—A notice, stating briefly the objects of the petition, *and containing a description of* THE LAND, REAL ESTATE, PREMISES OR PROPERTY SOUGHT TO BE APPROPRIATED, and stating the time and place when and where the same will be presented to the court, or the judge thereof, shall be

served on each and every person named therein as owner, encumbrancer, tenant, or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering a copy of such notice to each of the persons or parties so named therein, if a resident of the state; or in case of the absence of such person or party from his or her usual place of abode, by leaving a copy of such notice at his or her usual place of abode; or in case of a foreign corporation, at its principal place of business in this state, with some person of more than sixteen years of age. In case of domestic corporations, such service shall be made upon the president, secretary, or other directors or trustee of such corporation. In case of minors or (on) their guardians, or in case no guardian shall have been appointed, then on the person who has the care and custody of such minor. In case of idiots, lunatics, or distracted persons, on their guardian; or in case no guardian shall have been appointed, then on the person in whose care or charge they are found. In case the land, real estate, premises, or other property sought to be appropriated is (state, school) or county land, the notice shall be served on the auditor of the county in which the land, real estate, premises, or other property sought to be appropriated is situated. *In all cases where the owner or person claiming an interest in such real or other property is a non-resident of this state, or where the residence of such owner or person is unknown, and an affidavit of the agent or attorney of the corporation shall be filed that such owner or person is a non-resident of this state, or that, after diligent inquiry, his residence is unknown, or cannot be ascertained by such deponent, service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks; and in case no newspaper is published in said county, then such publication may be had in a newspaper published in the county nearest to the county in which*

lies the land sought to be appropriated. And such publication shall be deemed service upon each of such non-resident person or persons whose residence is unknown. Such notice shall be signed by the president, manager, secretary, or attorney of the corporation; and in case the proceedings provided for in this article are instituted by the owner or any other person or party interested in the land, real estate, or other property sought to be appropriated, then such notice shall be signed by such owner, person, or party interested, or his, her, or its attorney. Such notice may be served by any competent person over twenty-one years of age. Due proof of the service of such notice, by affidavit of the person serving the same, or by the printer's affidavit of publication, shall be filed with the clerk of such superior court before or at the time of the presentation of such petition. Want of service of such notice shall render the subsequent proceedings void as to the person not served; but all persons or parties having been served with notice as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings. In all other cases not otherwise provided for, service of notices, order, and other papers in the proceedings authorized by this article may be made as the superior court, or the judge thereof, may direct. (Cf. L. '88, p. 58, Sec. 2; L. '90, p. 295, sec. 2; 2 H. C., Sec. 649.)

* * * * * * * * *

Sec. 925. *Court to Adjudicate Necessity for Appropriation—Calling Jury.* At the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises or other property described in said petition, have been duly served with said notice as above prescribed, and shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use, or is for a private use for a private way of necessity,

and that the public interest requires the prosecution of such enterprise, or the private use is for a private way of necessity, and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing the sheriff to summon a jury. (Cf. L. '88, p. 60, sec. 4; L. '90, p. 297, sec. 4; 2 H. C., sec 651; L. '97, p. 63, sec. 1.)

SEC. 927. *Judgment and Decree of Appropriation.*—At the time of rendering judgment for damages, whether upon default or trial if the damages awarded be then paid, or upon their payment, if not paid at the time of rendering such judgment, the court, or judge thereof, shall also enter a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated, thereby vesting the legal title to the same in the corporation seeking to appropriate such land, real estate, premises, right of way, or other property for corporate purposes. Whenever said judgment or decree of appropriation shall affect lands, real estate, or other premises, a certified copy of such judgment or decree of appropriation may be filed for record in the office of the auditor of the county where the said land, real estate, or other premises are situated, and shall be recorded by said auditor like a deed of real estate, and with like effect. If the title to said land, real estate, premises, or other property attempted to be acquired is found to be defective from any cause, the corporation may again institute proceedings to acquire the same, as in this article provided. (Cf. L. '90, p. 298, sec. 6; L. '91, p. 84, sec. 1; 2 H. C. Sec. 653.)

* * * * * * * * *

SEC. 929. *Payment to Petitioner—On Appeal Money to Remain in Court.*—Upon the entry of judgment upon the verdict of the jury, or the decision of the court, or judge thereof, awarding damages, as hereinbefore prescribed, the petitioner, or any officer of or any other

person duly appointed by said corporation, may make payment of the damages assessed the parties entitled to the same, and of the costs of the proceeding, by depositing the same with the clerk of said supreme court to be paid out under the direction of the court or judge thereof and upon making such payment into the court of the damages assessed and allowed, and of the costs to any land, real estate, premises, or other property mentioned in said petition, such corporation shall be released and discharged from any and all further liability therefor, unless upon appeal the owner, or other person or party interested, shall recover a greater amount of damages; and in that case, only for the amount in excess of the sum paid into said court, and the costs of appeal; Provided, that in case of an appeal to the supreme court of the state by any party to the proceedings, the money so paid into the superior court by such corporation as aforesaid shall remain in the custody of said court until the final determination of the proceedings by the said supreme court. (L. '90, p. 299, Sec. 7; 2 H. C. Sec. 654.)

* * * * * * * * *

SEC. 931. *Appeal.*—Either party may appeal from the judgment for damages entered in the superior court to the supreme court of the state within thirty days after the entry of judgment as aforesaid, *and such appeal shall bring before the supreme court the propriety and justness of the amount of damages in respect to the parties to the appeal:* Provided, however, that no bond shall be required of any person interested in the property sought to be appropriated by such corporation, *but in case the corporation appropriating such land, real estate, premises, or other property is appellant, it shall give a bond like that prescribed in the next following section, to be executed, filed and approved in the same manner:* And provided further, that if the owner of the land, real estate, premises, or other property accepts the sum awarded by the jury, the court, or the judge thereof, he shall be deemed thereby to have waived conclusively an appeal to the

supreme court, and final judgment by default may be rendered in the superior court as in other cases. (Cf. L. '88, p. 61, sec. 9; L. '90, p. 300, sec. 9.)

Sec. 932. *Prosecution of Work Pending Appeal.*—The construction of any railway surface tramway, elevated cable tramway, or canal, or *the prosecution of any works or improvements by any corporation as aforesaid shall not be hindered, delayed or prevented by the prosecution of the appeal of any party to the proceedings: Provided, the corporation aforesaid shall execute and file with the clerk of the court in which the appeal is pending a bond to be approved by said clerk, with sufficient sureties, conditioned that the persons executing the same shall pay whatever amount may be required by the judgment of the court therein, and abide any rule or order of the court in relation to the matter in controversy.* (Cf. L. '88, p. 62, sec. 10; L. '90, p. 300, sec. 10; 2 H. C. sec. 657; L. '97, p. 64, sec. 2.)

Tax Laws.

Sec. 11235, Remington's Compiled Statutes of Washington, 1922 (formerly Sec. 9213, Edition of 1915):

> "For the purpose of raising a revenue for the state, county indebtedness, county current expenses, school, road and other purposes, the board shall, at said October session, levy a tax on all taxable property in the county, as shown by the assessment-roll, sufficient for such purposes; * * *" (L. '03, p. 339, sec. 1; Cf. L. '93, p. 361, sec. 64; L. '97, p. 167, sec. 63.)

[Note: This was re-enacted L. '25, Ex. Ses., p. 277, Chap. 130, Sec. 77, as follows:

> "For the purpose of raising revenue for state, county and other taxing district purposes, the

board of county commissioners of each county at its October session, and all other officials or boards authorized by law to levy taxes for taxing district purposes, shall levy taxes on all the taxable property in the county or district, as the case may be, sufficient for such purposes • • •"] Sec. 11097-77, Remington's Compiled Stat., 1927 Supp.

Sec. 11239, Remington's Compiled Statutes of Washington, 1922 (formerly Sec. 9216, Edition of 1915):

"The assessment year contemplated in this (chapter) shall commence on the first day of March and end on the last day of February in each year, and the fiscal year contemplated in this (chapter) shall commence on January first and end on December thirty-first of each year." (Cf. L. '93, p. 352, sec. 67; L. '97, p. 168, sec. 66.)

[Note: Re-enacted L. '25, Ex. Ses., p. 280, Chap. 130, sec. 81, with the change of the word "chapter" in the two places in which it occurs to the word "act."] Sec. 11097-81, Remington's Compiled Stat., 1927 Supp.

Sec. 11241, Remington's Compiled Statutes of Washington, 1922 (formerly Sec. 9218, Edition of 1915):

"On the first Monday of January next succeeding the date of the levying of taxes, the county auditor shall deliver to the county treasurer the tax rolls of his county, with his warrant thereto attached, and taking his receipt therefor, and charge the county treasurer therewith, and keep an account thereof in the manner required by law." (L. '09, p. 819, sec. 5.)

Sec. 11240, Remington's Compiled Statutes of Washington, 1922 (formerly Sec. 9217, Edition of 1915):

> "* * * The amount of said taxes due upon such books shall be charged to the treasurer in an account to be designated as treasurer's "Tax-roll account" for....., and said books with the warrants for collection shall be full and sufficient authority for the county treasurer to receive and collect all taxes therein levied: Provided, that the county treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such taxes upon said assessment-rolls before the first Monday of said February following." (Cf. L. '93, p. 353, sec. 68; L. '97, p. 168, sec. 67.)

[Note: These last two sections were re-enacted, L. '25, Ex. Ses., p. 280, Chap. 130, Sec. 82, as follows:

> "On the first Monday of January next succeeding the date of levy of taxes the county auditor shall deliver to the county treasurer the tax rolls of his county for such assessment year, with his warrant thereto attached, authorizing the collection of said taxes, taking his receipt therefor, and said books shall be preserved as a public record in the office of the county treasurer. The amount of said taxes levied and extended upon said rolls shall be charged to the treasurer in an account to be designated as treasurer's 'Tax Roll Account' for....., and said rolls with the warrants for collection shall be full and sufficient authority for the county treasurer to receive and collect all taxes therein levied: Provided, That the county treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such taxes

upon said assessment rolls before the first Monday in said February following."] Sec. 11097-82, Remington's Compiled Stats., 1927 Supp.

Sec. 11252, Remington's Compiled Statutes of Washington, 1922 (formerly Sec. 9219, Edition of 1915):

"The county treasurer shall be the receiver and collector of all taxes extended upon the tax rolls of the county, whether levied for state, county, school, bridge, road, municipal or other purposes, and also of all fines, forfeitures or penalties received by any person or officer for the use of his county. All taxes upon real property made payable by the provisions of this act shall be due and payable to the treasurer as aforesaid on or before the thirty-first day of May in each year, after which date they shall become delinquent, and interest at the rate of twelve per cent per annum shall be charged upon said unpaid taxes from date of delinquency until paid: Provided, however, that when the total amount of tax payable by one person is two dollars or more, then if one-half of such tax be paid on or before said thirty-first day of May, then the time of payment of the remainder thereof shall be extended and said remainder shall be due and payable on or before the thirtieth day of November following; but if the remaining one-half of such tax be not paid on or before the thirtieth day of November, then such remaining one-half shall be delinquent, and interest at the rate of twelve per cent per annum shall be charged thereon from the first day of June preceding until paid: Provided further, there shall be an allowance of three per cent rebate to all payers of tax who shall pay the taxes on real property in one payment and in full on or be-

fore the fifteenth day of March next prior to the date of delinquency. All rebates allowed under this section shall be charged to the county current expense fund and all collections from penalties and interest on delinquent taxes shall be credited to the current expense fund. (L. '17, p. 582, sec. 1; L. '99, p. 290, sec. 6; Cf. L. '93, p. 353, sec. 69; L. '95, p. 513, sec. 14; L. '97, p. 169, sec. 68.) Re-enacted verbatim—L. '25, Ex. Ses., p. 281, sec. 83. Sec. 11097-83, Remington's Compiled Stat., 1927 Supp.

Sec. 11267. Remington's Compiled Statutes of Washington, 1922 (formerly Sec. 9230, Edition of 1915).

"All taxes and levies which may hereafter be lawfully imposed or assessed shall be and they are hereby declared to be a lien respectively upon the real (estate) upon which they may hereafter be imposed or assessed, which liens shall include all charges and expenses of and concerning the said taxes which, by the provisions of this (chapter) are directed to be made. The said lien shall have priority to and shall be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation or responsibility to or with which said real (estate) may become charged or liable." (Cf. L. '93, p. 358, sec. 79; L. '95, p. 516, sec. 19; L. '97, p. 174, sec. 78.)

[Note: Re-enacted L. '25, Ex. Ses., p. 291, Chap. 130, Sec. 99, with the change of the word "estate" in the two places where it occurs to the word "property," and the change of the word "chapter" to the word "act."] Sec. 11097-99, Remington's Compiled Stats., 1927 Supp.

Sec. 11272. Remington's Compiled Statutes of Washington, 1922 (formerly Sec. 9235, Edition of 1915):

> "The taxes assessed upon real property shall be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the first Monday of February of the succeeding year. The taxes assessed upon personal property shall be a lien upon all the real and personal property of the person assessed, from and after the date upon which such assessment is made, and no sale or transfer of either real or personal property shall in any way affect the lien for such taxes upon such property." (L. '03, p. 74, sec. 3, Cf. L. '93, p. 361, sec. 88; L. '95, p. 520, sec. 21; L. '97, p. 176, sec. 83)

[Note: Re-enacted L. '25, Ex. Ses., p. 293, Chap. 130, sec. 104, as follows:

> "The taxes assessed upon real property shall be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the first Monday in February of the succeeding year. The taxes assessed upon each item of personal property assessed shall be a lien upon such personal property from and after the date upon which the same is listed with and valued by the county assessor, and no sale or transfer of such personal property shall in any way affect the lien for such taxes upon such property. The taxes assessed upon personal property shall be a lien upon each item of personal property of the person assessed, dis-

trained by the sheriff as provided in Section 86 of this act, from and after the date of distraint and no sale or transfer of such personal property so distrained shall in any way affect the lien for such taxes upon such property. The taxes assessed upon personal property shall be a lien upon the real property of the person assessed, selected by the county treasurer and designated and charged upon the tax rolls as provided in Section 112 of this act from and after the date of such selection and charge, and no sale or transfer of such real property so selected shall in any way affect the lien for such personal property taxes upon such property."] Sec. 11097-104, Remington's Compiled Stats., 1927 Supp.

FILE COPY

OCT 19 1929
CHARLES ELMORE CROPLEY

In the Supreme Court
OF THE
United States

October Term, 1929

No. 29

ALICE BARBEE WICK,
Appellant,

vs.

CHELAN ELECTRIC COMPANY,
Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of Respondent

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In the Supreme Court
OF THE
United States

October Term, 1929

No. 29

ALICE BARBEE WICK,
Appellant,

vs.

CHELAN ELECTRIC COMPANY,
Respondent.

Brief of Respondent

STATEMENT OF THE CASE

Alice Barbee Wick has appealed to this court from a judgment of the Supreme Court of the State of Washington, in an eminent domain proceeding affirming an order of public use and necessity and a judgment on a verdict of a jury awarding $13,500 damages, entered in the Superior Court of Chelan County. The action was brought by respondent Chelan Electric Company against appellant, a citizen of the State of Pennsylvania, and Chelan County,

Washington, a municipal corporation, a citizen of the State of Washington, to acquire the right to overflow and damage lands and property bordering on Lake Chelan in the State of Washington (T. 1-9, 20-23).

Schuyler J. Gray and wife, upon notice from the appellant, joined in a writ of error to review the judgment of the State Supreme Court affirming the order of public use and necessity entered by the Superior Court of Chelan County (Original Record, p. 371). A motion to pass consideration of the writ of error and to consolidate it with this appeal was denied October 29, 1928. *Wick, et al. vs. Superior Court,* 49 Sup. Ct. R. 94, 73 L. Ed. 87. The writ of error was dismissed by this court December 10, 1928, for the reason that the order sought to be reviewed was not a final judgment. *Wick, et al. vs. Superior Court,* 49 Sup. Ct. R. 94, 73 L. Ed. 190. Gray and wife have not joined in this appeal.

None of the other respondents in the sixteen condemnation cases which were consolidated by the trial court with this case has appealed to this court (T. 45, 143).

The decision of the Supreme Court of Washington affirming the order of public use and necessity

in the consolidated case is reported in *State ex rel. Woodruff vs. Superior Court,* 145 Wash. 129, 259 Pac. 379 (T. 142).

The opinion affirming the judgment on the verdict is reported in *Chelan Electric Co. vs. Wick,* 148 Wash. 479, 269 Pac. 827 (T. 202).

The appellant seeks to have the decisions of the Supreme Court of the State of Washington on both branches of the case reviewed by this court, but has not brought up the evidence in either proceeding. The statement of facts in *Chelan Electric Co. vs. Wick* was stricken from the record by the State Supreme Court (T. 203), and the evidence upon which the order of public use and necessity was made in *State ex rel. Woodruff vs. Superior Court* has not been certified.

The Supreme Court of Washington has determined adversely contentions made by the appellant and others in a series of cases involving the Lake Chelan project. *State ex rel. Chelan Electric Co. vs. Superior Court,* 142 Wash. 270, 253 Pac. 115; *State ex rel. Flick vs. Superior Court,* 144 Wash. 124, 257 Pac. 231; *State ex rel. Perry vs. Superior Court,* 145 Wash. 178, 259 Pac. 382; *Chelan Electric Co. vs. Perry,* 148 Wash. 353, 268 Pac. 1040.

In none of these cases has any attempt been made to invoke the jurisdiction of this court, except in the Crooker Perry case. A petition in that case for writ of certiorari was denied. *State of Washington ex rel. Crooker Perry, et al. vs. Superior Court,* 276 U. S. 626, 72 L. Ed. 738. An appeal in the same case was dismissed for want of a substantial Federal question. *Crooker Perry, et al. vs. Chelan Electric Co.,* 49 Sup. Ct. R. 478, 73 L. Ed. 545.

The Chelan Electric Company, pursuant to the state constitution and statutes (Appendix, p. 97), on September 17th, 1926, filed in the office of the Clerk of Chelan County a condemnation petition, which, having alleged jurisdictional facts, prayed that, after notice of hearing, the contemplated use be adjudged a public object and use, that the public interest requires the prosecution of the enterprise, that the property is required and necessary for the purposes of the project and that compensation be awarded therefor to the defendants entitled thereto. It is alleged that the names of each and every owner, encumbrancer and person or party interested in the property, so far as can be ascertained from the public records or otherwise, are Alice Barbee Wick (a citizen and resident of the State of Pennsylvania) and Chelan County, Washington, a municipal corpora-

tion (a citizen and resident of the State of Washington), and that the Chelan Electric Company, the petitioner, is a corporation organized and existing under the laws of the State of Washington (T. 3-9). At the same time a notice of hearing of the petition, returnable October 11th, was filed (T. 1-3). An affidavit of non-residence of appellant Wick having been filed September 22nd (T. 11), publication of the notice was made in a daily newspaper in the county seat of Chelan County once each week for three consecutive weeks, beginning September 23rd and ending October 7th, 1926 (T. 15). On the next day, October 8th, three days before the return day, which was October 11th, appellant Wick filed a special appearance in the case (T. 12, 195). On October 4th the appellant Chelan County filed a general appearance (T. 195). On October 11th all parties being then in court hearing on the petition was continued to November 4th, 1926, and was thereafter continued from time to time to February 28th, 1927 (T. 15, 35-45).

The hearing on the question of public use and necessity in the Wick (and in the sixteen other cases with which it was consolidated) began February 28th, 1927, and findings of fact, conclusions of law and an order of public use and necessity were entered by the trial court, after a hearing, on March 23rd, 1927 (T. 45-64).

On April 27th, 1927 (two months before the trial in the Superior Court on the question of damages) the petitioner filed a bill of particulars, giving a detailed metes and bounds description of the property sought to be condemned. This description covers over six pages of the printed transcript (T. 75-81). The order of public use and necessity was reviewed by the Supreme Court of the State of Washington upon a writ of certiorari (T. 142, 194).

The Supreme Court remitted the case to the Superior Court for trial on the question of damages (T. 142-149). In the meantime, and on June 23rd, 1927, the case proceeded to trial before a jury in the Superior Court on the question of the amount of compensation to be paid to the owners, encumbrancers and persons or parties interested in the property sought to be condemned. A verdict was returned awarding $13,500 as full compensation to be paid to the "owners and all tenants, encumbrancers and others interested for the taking or injuriously affecting the land, real estate, premises and property described in the petition and bill of particulars in this action" (T. 114). Judgment on the verdict was entered on July 9th, 1927, and the respondent having deposited the amount of the verdict, costs and interest in court, a decree of appropriation was entered on the same day (T. 125-141).

Upon appeal from the judgment on the verdict the State Supreme Court affirmed the judgment of the lower court, after striking the statement of facts, which had not been filed in accordance with the state statutes (T. 202). The appeal is from this judgment (T. 155).

No reference has been made to the removal proceedings, which are referred to in detail in that part of the brief in which this question is discussed.

STATEMENT OF FACTS

The only facts before the court are those disclosed by the findings (T. 45), the order denying the second petition for removal (T. 92), the opinions of the State Supreme Court (T. 142, 202), and the Federal Power License (T. 159). The order denying the second petition for removal recites some of the facts which appeared of record at the trial on the question of damages. Otherwise the evidence introduced at this trial is not before the court (T. 203). No attempt has been made to take up the evidence introduced at the hearing on the question of public use and necessity.

The Chelan Electric Company is incorporated, authorized and licensed to do business in the State of Washington as a public service corporation, and its

corporate powers include the right to develop the water power of Lake Chelan and the Chelan River. Requisite permits from the State to appropriate the necessary waters, to construct the reservoir and store such waters were issued. These permits entitle the Electric Company to the use of the waters in the development of electric power and energy for municipal lighting, railway operation, irrigation pumping and other uses permitted by law. Lake Chelan is one of the navigable waters of the United States. The Federal Power Commission has issued to the Chelan Electric Company a license for the construction, operation and maintenance of dams and other project works necessary for the water power development, subject to terms which were accepted by the Electric Company. The stock of the Chelan Electric Company is owned by The Washington Water Power Company, a duly authorized public service corporation of the State of Washington, which is under contract to furnish other public service corporations in Washington electrical energy for the operation of railways and also to furnish municipal corporations and their inhabitants electrical energy for lighting streets and homes and other public uses.

The power generated at Lake Chelan is to be distributed by The Washington Water Power Company.

which owns seven hydro-electric plants, and in the years 1925 and 1926 these seven plants were insufficient to supply the needs of its customers and it was necessary for it to purchase power from other companies to avoid a shortage. For this reason and the increasing demands for power, and in order to accommodate the public, it became necessary to develop another power plant, which it planned to do by the development of the Lake Chelan enterprise through the acquisition of the stock of the Chelan Electric Company.

To develop power at Lake Chelan it is necessary to construct a dam in the Chelan River for the storage of water in Lake Chelan to the maximum elevation of 1100 feet, still water measurement, above mean sea level, and to overflow the land of appellant lying below said elevation. The electric energy so produced, the trial court found, "is and will be devoted to public use, and the object for which the lands, real estate, premises and property of the respondents are sought to be appropriated is and will be a public object and use and the public interest requires and will require the prosecution of the enterprise of the petitioner." (T. 2-9, 45-64.) This was also found as a fact by the State Supreme Court (T. 143).

The appellant owns lands bordering upon Lake Chelan and this action was instituted "to acquire the perpetual right to impound the waters of Lake Chelan and the Chelan River and to raise the same to the maximum elevation of 1100 feet above mean sea level and to inundate and overflow to the maximum elevation of 1100 feet above mean sea level" the lands of appellant, and to have a jury determine the amount of damages to be awarded for the taking and injuriously affecting the said lands (T. 3-9).

Chelan County, Washington, a municipal corporation, was joined as a party defendant, it being alleged in the petition to be one of the owners, encumbrancers and persons or parties interested in the property described in the petition.

The facts will be referred to more in detail in the body of the brief.

APPELLANT'S CONTENTIONS

A fair statement of the points raised by appellant is as follows:

(1) The state statute providing for notice to nonresidents in eminent domain proceedings by newspaper publication once a week for two consecutive weeks, and the notice actually given, do not constitute

due process of law under the Fourteenth Amendment to the Constitution of the United States;

(2) The condemnation of appellant's property in the State of Washington for the purpose of developing electric energy to be distributed by another public service corporation, or to be used in the State of Idaho, constitutes the taking of private property for private use, which amounts to the taking of appellant's property without due process of law;

(3) The description of appellant's property sought to be condemned was so inadequate as to constitute depriving appellant of her property without due process of law;

(4) By measuring the elevation of the lake at still water the land appropriated was in excess of that sought to be condemned in the notice and petition and authorized by the Federal Power license, and therefore amounted to depriving appellant of her property without due process of law;

(5) The instructions given to the jury were erroneous and those refused correctly stated the law;

(6) Appellant was denied the right of removal to the Federal Court on the ground of diversity of citizenship, by reason of an alleged improper joinder of Chelan County as a party defendant, it being con-

tended that the state tax statute and its construction by the Supreme Court of the State of Washington to the effect that taxes are a lien upon land before they are permitted to be paid, is in conflict with Article III, Section 2, paragraph 1, of the Constitution of the United States.

SUMMARY OF RESPONDENT'S ARGUMENT

(1) The notice to non-residents of the hearing of the condemnation petition by publication once a week for two consecutive weeks provided by the state statute, and the notice actually given by publication for three consecutive weeks, the first publication being eighteen days before the return day, was reasonable and adequate, constituted due process of law, and resulted in the appearance of the appellant in the proceeding three days before the return day;

(2) The power of the Chelan Electric Company to condemn appellant's property for public use is not affected by the fact that another public service corporation will distribute the power to the consumers;

(3) The transmission of power generated at Lake Chelan in the State of Washington into the State of Idaho is not an issue in this case, both the trial and the State Supreme Court having found as a fact that none of the Chelan power would be used in Idaho;

(4) All of the Chelan power will be devoted to public uses;

(5) A full, adequate and sufficient metes and bounds description of the property sought to be condemned was furnished appellant two months prior to the trial on the question of damages, and the description contained in the notice and petition was sufficiently definite whether service was made personally or by publication;

(6) There is no substantial difference between the order of public use and necessity and the final judgment giving respondent the right to store the water in Lake Chelan to the maximum elevation of 1100 feet, still water measurement, above mean sea level, and the prayer of the original petition for the right to impound and store the water of the lake to the maximum elevation of 1100 feet above mean sea level, and the right granted to respondent by the order of public use and necessity and the final judgment is within those sought in the original petition and authorized by the Federal power license;

(7) The contentions relative to the giving and refusal of instructions do not raise any Federal questions and are not before this court for review;

(8) The case was not removable to the Federal Court, and, having been once removed and remanded, there was no denial of the right of removal. The constitutionality of the tax statutes of Washington is not an issue;

(9) The assignment of errors from the trial court to the State Supreme Court has not been incorporated in the record, nor has the testimony in either proceeding been certified to this court. The only Federal questions that can be considered are those passed upon by the Supreme Court of the State of Washington, and since no substantial Federal questions were decided by that court there is no Federal question raised by this appeal.

ARGUMENT

I. The notice to non-residents of the hearing of the condemnation petition by publication once a week for two consecutive weeks provided by the state statute, and the notice actually given by publication for three consecutive weeks, the first publication being eighteen days before the return day, was reasonable and adequate, constituted due process of law, and resulted in the appearance of the appellant in the proceeding three days before the return day.

The Washington condemnation statute relating to notice provides that in cases of non-residents "service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks . . . And

such publication shall be deemed service upon each of such non-resident person or persons whose residence is unknown." Remington's Compiled Statutes of Washington, Sec. 922 (Appendix, p. 99).

The notice of hearing filed in the cause on September 17, 1926, fixed the return day October 11th, 1926 (T. 1). The notice was published September 23, September 30 and October 7, 1926 (T. 146, 16). Fourteen days intervened between the first and the last publications and eighteen days between the first publication and the return day (T. 3). The appellant appeared in the cause three days before the return day, or on October 8, fifteen days after the first publication of the notice (T. 12). The hearing was actually held February 28, 1927, over four and one-half months later. The appellant, through her counsel, was present at the hearing and contested the granting of the order of public use and necessity (T. 45). At the time appellant filed her appearance on October 8, three days prior to the time she was required by law to appear, she objected to being required to appear on the ground that she had not had sufficient notice to enable her to do the thing that she was doing (T. 12-14).

Appellant contends that the Washington statute requires that the notice must be published once a

week for two successive weeks and that ten days must elapse after the expiration of this two weeks' period before the hearing can be held, so that the hearing in this case could not be prior to October 17, whereas the return day fixed in the notice was October 11th. It is then argued that the publication was not complete until October 7 and therefore appellant had only four days' notice prior to the return day.

But the Supreme Court of Washington rejected this interpretation of the statute proposed by appellant, saying:

> "Our statute says nothing whatever about a return day, but only the number of publications of the notice where publication must be had. The return day not being regulated by statute, as was the case in *Roller vs. Holly, supra* (176 U. S. 398; 44 L. Ed. 520), it is fixed independently of it, so that the question in this case is, was the eighteen days' notice that was actually given, that is, the time that elapsed from the date of the first publication of the notice and the return day, unreasonably short under the provision of the Constitution." (T. 147.)

The statute of the State of Washington having been thus interpreted by the highest court of that state, appellant is not entitled to have this court reinvestigate that question for the purpose of determining whether it will make a different interpretation of the Washington statute.

The construction of a statute by the state court is regarded as a part of the statute and it is as binding upon the courts of the United States as the text. *C. M. & S. P. Ry. Co. vs. Risty,* 276 U. S. 567; 72 L. Ed. 703; *Knights of Pythis vs. Meyer,* 265 U. S. 30, 33; 68 L. Ed. 885, 888; *Saltonstall vs. Saltonstall,* 276 U. S. 260, 270; 72 L. Ed. 565, 568; *Carroll County vs. U. S.,* 18 Wall. 71, 82; 21 L. Ed. 771, 775; *N. P. Ry. Co. vs. Meese,* 239 U. S. 614; 60 L. Ed. 467; *C. & N. W. R. Co. vs. Nye-Schneider-Fowler Co.,* 260 U. S. 35; 67 L. Ed. 115; *Tullis vs. S. E. & W. R. R. Co.,* 175 U. S. 348; 44 L. Ed. 192; *Bucher vs. Cheshire Ry. Co.,* 125 U. S. 555; 31 L. Ed. 795; *Leffingwell vs. Warren,* 2 Black 599; 17 L. Ed. 261.

> "Mixed with the contention is a charge that the notice to non-residents did not comply with the Act of 1893 or the general law of the state, but this is decided against plaintiffs in error by the Supreme Court of the state and we accept its ruling . . . What the statute required was for the Supreme Court to determine; whether as determined, it constituted due process, is for us to decide."
>
> *Ballard vs. Hunter,* 204 U. S. 241, 255; 51 L. Ed. 461, 471, 474.

In the case of *House vs. Road Improvement Dist. No. 5,* 266 U. S. 175, 177; 69 L. Ed. 229, 230, the appellant alleged that the state statute authorized and the commissioners gave only 17 days' notice by pub-

lication of an assessment for benefits in the establishment of a road district and that such publication did not afford due process of law. The state court held the statute allowed, and appellant had, twenty-eight days after the first publication. This court accepted the interpretation of the state statute by the state court, saying:

> "Accepting the statute as construed by the state court, the suggested objections to its validity appear wholly wanting in merit."

In the case at bar the Supreme Court of Washington held that the statute requires publication once each week for two successive weeks, that it does not regulate the return day but leaves that to be fixed by the petitioner, that in this case the return day was 18 days after the first publication and that the 18 days which elapsed between the date of the first publication and the return day gave appellant a reasonable time within which to appear in the action and an opportunity to be heard.

Therefore the question before this court is whether a statute providing for publication of notice once a week for two successive weeks and a notice published pursuant to that statute giving 18 days' time between the first publication and the return day constitute due process of law under the Constitution of the United States.

With reference to indirect notice in actions *in rem,* as applied to lands in proceedings seeking to subject them to public necessity, there is a sensible and practical theory supported by authority that the test is whether the publication of notice was such as to create a reasonable presumption that, if the owner is present and taking care of his property, he would receive notice of what is going on and have an opportunity to defend. *Ballard vs. Hunter,* 204 U. S. 241; 51 L. Ed. 461; *Bellingham Bay I. & B. C. R. R. Co. vs. City of New Whatcom,* 172 U. S. 314; 43 L. Ed. 460; *Huling vs. Kaw Valley R. & Imp. Co.,* 130 U. S. 559; 32 L. Ed. 1045; *Windsor vs. McVeigh,* 93 U. S. 274; 23 L. Ed. 914; *G. N. Ry. Co. vs. City of Minneapolis,* 136 Minn. 1; 161 N. W. 231; *State ex rel. Woodruff vs. Superior Court of Chelan County,* 145 Wash. 129; 259 Pac. 379; *Goodrich vs. Ferris,* 214 U. S. 71; 53 L. Ed. 914; 145 Fed. 844, 859.

The law presumes that an owner of real property is paying some attention to what is going on in the locality where his property is situated. With respect to this presumption, the court says in *Ballard vs. Hunter,* 204 U. S. 241 at page 262, 51 L. Ed. 461, at page 474:

> "The law cannot give personal notice of its provisions or proceedings to everyone. It charges everyone with knowledge of its provisions; of its

proceedings it must, at times, adopt some form of indirect notice; and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns, or may concern their real estate, men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises."

In *Huling vs. Kaw Valley R. & I. Co.*, 130 U. S. 559; 32 L. Ed. 1045, it is declared to be "the duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition; and if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences." See *Windsor vs. McVeigh*, 93 U. S. 274; 23 L. Ed. 914.

It was held by Judge Morrow in *Goodrich vs. Ferris*, 145 Fed. 844, 859, that a proceeding to secure distribution of the estate of a decedent, is essentially one *in rem*, in which the parties interested may be bound by constructive notice, the reasonableness of which must be determined with reference to the requirements of ordinary cases; and that notice given by posting ten days before the hearing was not unreasonably short, and constituted due process of law as

against all parties, without regard to their place of residence. Quoting from that decision:

> "If in such proceeding the entire world is called before the court, and to enable the court to enter a valid decree the entire world must have reasonable notice, it will necessarily follow that the notice that will bind all parties must be of such nature as could reach the most distant possible party interested in the estate. To state the proposition is to show its absurdity. It would be impracticable, and, moreover, under such a rule no decree would carry with it any presumption of validity, but rather, on the contrary, invite the presumption that it was invalid. 'Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition and of the vicissitude to which they are subject. This is the foundation of all judicial proceedings in rem.'"

We are not here concerned with the question whether appellant, a resident of Pennsylvania, had sufficient time to receive word of this eminent domain proceeding through the mails and to travel to the state of Washington to prepare a defense to the action. The law presumes that every owner is in possession of his property either personally or by agent and that either he or his agent will read and heed any notices published concerning his property. In the exercise of the power of eminent domain the state of

Washington could have directed that private property within its borders could be taken for public use without any specific reference in the notice to the name of the owner so long as it provide for a notice to be published containing a description of the property adequate to convey either actual or constructive notice to the owner, or to an agent in possession or managing the property for the owner, of the intention to appropriate.

> *Ballard* vs. *Hunter*, 204 U. S. 241, 256, 257; 51 L. Ed. 463, 472; *Castillo* vs. *McConnico*, 168 U. S. 674; 42 L. Ed. 622; *Pennoyer* vs. *Neff*, 95 U. S. 714; 24 L. Ed. 565, 570.

The principles determining the validity of statutes regulating notice by publication in condemnation proceedings are well stated in a decision of the Supreme Court of Iowa:

> "The legislature having been given the power by the Constitution to appropriate property for the public use upon the payment of adequate compensation, the authority to authorize the proceedings by which such appropriation shall be made necessarily is implied. Whatever these may be, the owners from whom the appropriation is to be made must have notice sufficient to apprise them what is to be done, and for sufficient time to afford them the opportunity to have a hearing before a competent tribunal. Such notice may be by publication, but for how long a time before the hearing? This is largely a matter of legislative discretion. The time may not be so

brief that *if the owner were to read the notice when first published* he could not, with reasonable diligence, prepare for and reach the place of hearing so as to present his claim; that is, it may not be arbitrarily so limited as that, were the published notice to reach him, he would not have the chance to present his claim. On the other hand, it need not be for so long a time as to insure knowledge to everyone. All necessary is that the publication of notice be made under such circumstances that persons of ordinary intelligence having an interest in the subject-matter living in the community, will be reasonably likely either to read the notice as published, or learn thereof from or through other sources. This is the theory on which service of notice by publication generally is sustained. Reaching those residing in the immediate community, it is assumed to have come to the knowledge of the non-resident through those to whom he has intrusted his property, or who are representing him, and if he has not taken these measures of protection and fails to get the notice as published, it is his misfortune, and he must bide the consequences. *Hulbert* vs. *New Valley R. & Improv. Co.*, 130 U. S. 510, 32 L. Ed. 1045; 9 Sup. Ct. Rep. 603. The time allowed should be ample to afford a reasonable probability that he would become informed of the proceedings against his property, and be fairly able to assert his right before it is finally barred." *Taylor* vs. *Drainage District No. 56*, 167 Ia. 42; 148 N. W. 1040.

The due process clause of the Constitution of the United States does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has rea-

sonable notice, and reasonable opportunity to be heard and to present his claim or defense. Twenty days' written notice of a proceeding to revoke the license of a physician has been held reasonable. *State of Missouri ex rel. Hurwitz vs. North,* 271 U. S. 40, 42; 70 L. Ed. 818, 821; 12 Corpus Juris, page 1232.

In the case of *Roller vs. Holly,* 176 U. S. 398, 44 L. Ed. 520, relied on by appellant, it was practically impossible for the defendant who was in Virginia, to appear in Texas within the five days prescribed by the notice, and judgment against him was taken by default. There was no default here. The Washington court in distinguishing this case said:

> "Counsel argues, as we understand, that, because our statute speaks of two weekly publications, it means eight days' notice and that that length of time, under the circumstances in this case, does not furnish due process of law under the doctrine of the *Roller* case. That case speaks of the date of *service* with relation to the *return* day. Our statute says nothing whatever about a *return* day, but only the number of publications of the notice, where publication must be had. The return day not being regulated by statute, as was the case in *Roller vs. Holly, supra,* it is fixed independently of it, so that the question in this case is, was the eighteen days' notice that was actually given, that is, the time that elapsed from the date of the first publication of the notice and the return day, unreasonably short under the provision of the constitution?"

State ex rel. Woodruff vs. Superior Court, 145 Wash. 129; 259 Pac. 379 (T. 147).

While five days' notice was held not to constitute due process of law in *Roller vs. Holly,* a suit between private parties, it does not necessarily follow it would not be due process in an eminent domain proceeding. In that case the court says, "An ordinary summons to answer the suit of a private individual contemplates that the party served may have other business of equal or greater importance engaging his attention."

In *Davidson vs. New Orleans,* 96 U. S. 97, 108; 24 L. Ed. 616, 620; *Hagar vs. Reclamation District,* 111 U. S. 701, 715; 28 L. Ed. 569, 572, it is said:

> "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvements or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law.'"

What the law is concerned with is that there be a publication for a sufficient length of time that will enable the owner, if he is watching his property in the manner that the law presumes he will watch it, to appear in court and protect his interests.

In the case of *Great Northern vs. City of Minneapolis,* 161 N. W. 231, 233, in passing on this question in an eminent domain proceeding the court said:

> "The test is whether the publication was of such a character as to create a reasonable presumption that if the owner is present and taking care of his property, he will receive the information of what is proposed and when and where he may be heard."

In 2 Lewis Eminent Domain (3rd Ed.) Sec. 568, page 1012, in regard to the manner or time of posting or publishing notice, in order to satisfy the requirements of the constitution, it is said that "no definite rule is laid down by the authorities. Any statutory provision in this respect which did not savor of bad faith would probably be upheld."

In *Hanover National Bank vs. Moyses,* 186 U. S. 181, 192; 46 L. Ed. 1113, the constitutionality of the bankruptcy act was attacked, upon the ground that "the notice provided by the act (10 days) is unreasonable," and did not amount to due process of law. Chief Justice Fuller, in overruling this contention, said:

> "Considering the plenary power of Congress, the subject matter of the suit and the common rights and interests of the creditors, we regard the contention as untenable. Congress may prescribe any regulations concerning discharge in

bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law, and we cannot find any thing in this act on that subject which would justify us in overthrowing its action."

It was held in *North Laramie Land Co. vs. Hoffman,* 268 U. S. 276, 285; 69 L. Ed. 953, 958, that notice of initiation of proceedings for the establishment of a public road by publication for three successive weeks in three successive issues of a paper published in the county, satisfies all requirements of the Federal Constitution as to due process of law, saying:

"All persons are charged with knowledge of the provisions of statutes, and must take note of the procedure adopted by them, and when that procedure is not unreasonable or arbitrary, there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application—facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it. Owners of real estate may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure, summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of pro-

ceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter, and afford to the property owner reasonable opportunity, at some stage of the proceedings, to protect his property from an arbitrary or unjust appropriation."

In the case at bar the notice was published for three successive weeks in three successive issues of a paper published in Chelan County (T. 146, 15, 16).

It was held in *Dryer vs. Mayor of Baltimore,* 140 Fed. 880, in a condemnation suit by the City of Baltimore to acquire property for harbor and dock purposes, that the provisions of the statute requiring two weeks' notice by publication of the meeting of the Commission to assess damages to property owners, after the plans for the improvement had been adopted, four days' notice of the time set for reviewing the assessment after it had been made, and two weeks' notice of the right to appeal, were reasonable with respect to the length of notice, and did not violate the constitutional rights of a property owner.

In the case of *Tuller vs. City of Detroit,* 56 N. W. 1032, an action by the City of Detroit to condemn property for street purposes, it was held that the publication of the summons for five days in five successive issues of the daily paper, complied with the statute and the constitution.

The Supreme Court of Washington has held that the Washington statute does not regulate the return date and that a return day eighteen days from the date of the first publication is not unreasonable. This court is of course bound by the state court's interpretation of the Washington statute. Moreover the decision of the Washington court on this question is in accordance with the weight of authority that the time is computed from the date of the first publication. *House vs. Road Improvement Dist. No. 5,* 266 U. S. 175, 177; 69 L. Ed. 229, 230; *Newman vs. Lynchburg Inv. Corporation,* 236 U. S. 692, 695; 59 Law Ed. 792, 795; *Nishnabotna Drainage District vs. Campbell,* 55 S. W. (Mo.) 276; *Harrison vs. Newman,* 80 Pac. (Kans.) 599.

In the case of *New Whatcom vs. Bellingham Bay Improvement Co.,* 16 Wash. 131, 134, an action to enforce a reassessment of the costs of a local improvement, the statute required objections to the assessment roll to be made within ten days from the last publication of the notice, and that notice be published in three successive issues of the official paper of the city. It was contended that the time was so short as to amount to lack of due process of law. The case finally reached this court where it was held that the ten days' notice was not unreasonably short, the court

saying, "And especially is this true when the Supreme Court of the state in which the proceedings were had has ruled that it was sufficient." Quoting further from that case:

> "It may be that the authority of the legislature to prescribe the length of notice is not absolute and beyond review, but it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time. The purpose of notice is to secure to the owner the opportunity to protect his property from the lien of the proposed tax or some part thereof. In order to be effectual it should be so full and clear as to disclose to persons of ordinary intelligence in a general way what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property, will receive the information of what is proposed and when and where he may be heard.
>
> "And the time and place must be such that with reasonable effort he will be enabled to attend and present his objections. Here no question is made of the form of the notice. It was published in three successive issues of the official paper of the city. So the statute required. What more appropriate way of publishing the action of a city than in its official paper? Where else would one interested more naturally look for information? And is not a repetition in three successive issues of the paper sufficient? How seldom is more than that required!"

Bellingham Bay & B. C. Railroad Co. vs. City of New Whatcom, 172 U. S. 314, 319; 43 L. Ed. 460.

In the case of *Security Savings Bank vs. California,* 263 U. S. 282, 290; 68 L. Ed. 301, 308, the court says:

> "The highest court of the state deemed the prescribed publication reasonable notice. The question is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts."

Not only was the publication made in this case, and the time that elapsed between the first publication and the return day, sufficient to enable the appellant, if she was watching her property in the manner that the law presumes she will watch it, to appear in court and protect herself but she actually did appear three days prior to the time the notice required her to do so and objected because she did not have longer notice. And after that she had almost five months within which to prepare for trial.

What is reasonable notice is in the nature of a mixed question of law and fact. The fundamental requisite of due process of law is the opportunity to be heard. *Grannis vs. Ordean,* 234 U. S. 385, 394; 58 L. Ed. 1363, 1369. Appellant not only had the opportunity to be heard but she was heard. From a practical standpoint the notice was sufficient because it

resulted in getting appellant into court. Similar protests by litigants who claimed insufficient notice but who actually were in court in time to protect their interests were held to be lacking in merit in *Tyler vs. Judges of Court of Registration,* 179 U. S. 405, 409; 45 L. Ed. 252, 254; *Brophy vs. Kelly,* 211 Fed. 22, 28; *Nysewander vs. Lowman,* 24 N. E. 355.

A thorough examination of the authorities cited by appellant on this branch of the case discloses that many of them relate to statutes that are entirely different from the eminent domain statute in force in the State of Washington, that others are not in point, do not sustain appellant's contention, support respondent's position, or are not in accord with the decisions of this court.

The case of *Early vs. Homans,* 16 How. 616, 14 L. Ed. 1079, cited by appellant, not only does not support her contention, but sustains the position of respondent. Appellant in the case at bar contends that a statute requiring publication of a notice "once a week for two successive weeks" requires a lapse of two full weeks and ten days after the last publication before the notice becomes effective. The statute in the Early case provided for sale upon a return day, after advertisement "once in each week for at *least* twelve successive weeks." This court said:

"We do not doubt if the statute had been 'once in each week for twelve successive weeks,' the previous notice of the particular day of sale having been given to the owner of the property, that it might very well be concluded that twelve notices in different successive weeks, though the last insertion of the notice for sale was on the day of sale, was sufficient."

This distinction was followed in the next case cited by appellant, *Leach vs. Burr,* 188 U. S. 510, 512; 47 L. Ed. 567, 568. Similar language was used in the statute construed in *Foster vs. Vehmeyer,* 133 Cal. 459; 65 Pac. 974. The following cases cited by appellant are not in point:

Security Trust Co. vs. Lexington, 203 U. S. 323, 51 L. Ed. 204, holds that the plaintiff had had an opportunity to be heard upon a question of lack of notice; that having been heard and the assessment reduced it had obtained all the hearing it was entitled to.

Central of Georgia Ry. Co. vs. Wright, 207 U. S. 127, 52 L. Ed. 134, holds that an assessment of capital stock of a railway without notice of hearing denied due process of law.

L. & N. R. R. Co. vs. Central Stock Yards Co., 212 U. S. 132, 53 L. Ed. 441, holds that a statute requiring a carrier to deliver its own cars to another carrier which did not protect the owner from loss or undue de-

tention of cars, violated the due process clause. The question of notice was not considered.

Coe vs. Armour Fertilizer Works, 237 U. S. 413, 59 L. Ed. 412, holds that a statute failing to provide for notice, hearing or opportunity to be heard prior to execution against a stockholder for unpaid subscriptions, when a return of *nulla bona* had been made on an execution against a corporation did not afford due process of law.

Wuchter vs. Pizzutti, 276 U. S. 13, 72 L. Ed. 446, holds that a statute providing in actions against non-residents for damages on account of automobile accidents, service could be made upon the Secretary of State without any reasonable provision being made for service of notice upon such non-residents, violates the Fourteenth Amendment.

Southern Ry. vs. Simon, 184 Fed. 959, relates to service on foreign corporations by serving the Secretary of State, without any provision being made for notice to the foreign corporation, and was held violative of the due process clause.

The quotation from *In re Meyer*, 158 Minn. 433, 197 N. W. 770, is from the first opinion of the Minnesota Supreme Court, afterwards reversed on rehearing, 199 N. W. 746.

Boad vs. Penn. R. R. Co., 124 Minn. 181, 144 N. W. 942, holds that an action commenced by the placing of a summons in the hands of a Minnesota sheriff and completed within a year, was within the period prescribed by the Pennsylvania statute of limitations.

State vs. Morrison, 132 Minn. 454, 157 N. W. 706, holds that a notice in a highway proceeding, returnable at a special term to be held August 24th, was valid when heard August 31st, the actual day of holding the special term:

> "The relator was not so misled that the opportunity to fully assert his rights was in any manner lost to him; for he was present with his attorney on such special term day as well as on the 24th."

Auerbach vs. Maguard, 26 Minn. 420, holds that under a statute providing for publication of a summons in an attachment proceeding, it was necessary to publish for six consecutive weeks and that the action was not commenced by one publication only.

Coe vs. North Wisconsin Lbr. Co., 92 Wis. 141, 31 N. W. 1130, is not in accord with the holding of this court in *Early vs. Hommes*, *supra*.

The Washington Statute has been in effect for 39 years. A court should be slow to overturn a statute that has been enforced for such length of time, under

which thousands of condemnation suits have long brought and property rights of great value determined. In answer to a similar contention, the Supreme Court of Michigan said in *Continental Improvement Co. vs. Phelps*, 11 N. W., 396:

> "It is now more than ten years since the act was passed and dovetailed into our system of important statutes. The people and the government have acquiesced in it as a piece of legislation lawfully enacted, and interests of vast magnitude have meanwhile sprung forth and flourished under it. The whole country has acted on the faith that it originated legitimately and constituted a valid statute; and if we were satisfied that the legislature stumbled and overlooked something, which a nice regard for the claim relieved to would have prompted, we should deem it our duty to yield to the long practical construction and acquiescence and decline to set up a view which would rend both and overturn the statute and uproot and destroy an array of interests it would be difficult to either measure or sunder."

B. The Power of the Chelan Electric Company to Condemn Is Not Affected by the Fact that Another Public Service Corporation will Distribute the Power to the Consumers.

Appellant's contention is succinctly stated by the Supreme Court of the State of Washington:

> "It is claimed that the use contemplated in this case is not a public use because the Chelan Electric Company has no transmission line nor any customer except the Washington Water Power Company, which owns practically all of the stock of the Chelan Electric Company. That

situation is explained in the *Getty* case. The Washington Water Power Company is a public service corporation of this state and is handling the enterprise in the name of the other corporation which was organized for similar public purposes. So far as this point is concerned there is no question about the public use to which the property will be put." (T. 143.) (Findings of Fact T. 49-57.)

State ex rel. Woodruff vs. Superior Court, 145 Wash. 129; 259 Pac. 279.

In the *Getty* case, the Supreme Court summarized the relationship of the Washington Water Power Company to the Chelan Electric Company:

"Ballster is a public service corporation which desires to expropriate the right to overflow certain lands of the respondents for the purpose of raising the surface of Lake Chelan, and thereby developing a large amount of electric energy. The primary purpose of the corporation appears to have been to furnish motive power for the operation of the trains of the Great Northern Railway Company, but, owing to the fact that the Railway Company has not yet started the development of its properties for that purpose, it was deemed better to allow the development of the power site to be handled by a company already actively engaged in that business, and which would have immediate demand and sale for the energy thus produced. To this end all of the stock, save five qualifying shares, were sold to the Washington Water Power Company, which company agreed to develop the project and sell electricity to the railroad, when and as it became needed through the electrification of its railroad lines.

"The Washington Water Power Company, which thus became practically the sole owner of the relator company, has been engaged in business in this state for many years supplying electrical energy to a very large extent in eastern Washington, and to a lesser extent in the neighboring state of Idaho. It has five water power sites on the Spokane River in this state and one in Idaho. It supplies electric energy to other public service corporations for the operation of railways and electric lines, furnishes power to municipalities and the inhabitants thereof for lighting streets and homes, as well as supplying power for general uses. Its present capacity of electric energy is insufficient for the demands made upon it, and, in 1925 and 1926, it was obliged to purchase power to avoid a shortage. To overcome the shortage and comply with new contracts, it is seeking to develop the Lake Chelan project. The power produced at this project will be delivered to it, and from it to its customers in the State of Washington."

After referring to its earlier decisions, the court says:

"This state has by statute, since that time, created the Public Service Commission with a duty upon it of regulating the service given and the rates charged by such companies as the relator, and it has submitted itself to that jurisdiction. The rights of the public to the use and enjoyment of electric power are, therefore, regulated, guaranteed and safeguarded by proper legislation, and public necessity requires that in fulfilling the duties it owes to the public generally, it be granted the right of eminent domain."

State ex rel. Chelan Electric Co. vs. Superior Court of Chelan County, 142 Wash. 270; 253 Pac. 115.

There is very good reason for the Chelan Electric Company delivering the electricity generated by the Chelan plant to the Washington Water Power Company for distribution and sale. Under the Federal Water Power Act (Act of Congress, approved June 10, 1920, 41 Stat. 1063), the government reserves the right at the end of the license period, which is in this case fifty years, to recapture the whole project from the licensee upon the payment of certain sums of money. The project boundaries and the lands included in the project are specifically designated in the license and in the papers and maps which must be furnished to the Federal Power Commission upon the completion of the project. It is, therefore, wise to keep the Chelan project as a whole in the ownership of a company entirely separate from the Washington Water Power Company except in its stock ownerships. (T. 159-175.)

Such an arrangement also simplifies the methods of accounting. Under the Federal Water Power Act, there are certain provisions whereby, in case the earnings of the plant exceed a certain predetermined amount, the government recaptures the excess earnings. For this additional reason it is wise to keep

the Chelan project separate from the other plants and properties of the Washington Water Power Company.

The fact that the Chelan Electric Company will deliver the power generated at Lake Chelan to the Washington Water Power Company for distribution does not affect the right of the former to condemn. The right of eminent domain may be exercised by a company which is not to serve the public directly but is to furnish a needed facility to other public service corporations through which the public actually enjoys the use. *Beckman vs. Lincoln & N. W. R. R. Co.,* 112 N. W. 348, 350; *Dietrichs vs. L. & N. W. Ry.,* 13 Neb. 361, 13 N. W. 624; *Gottschalk vs. L. & N. W. R. R. Co.,* 14 Neb. 389, 15 N. W. 695; *C. & W. I. R. R. Co. vs. Ill. Cent. Co.,* 113 Ill. 156; *Lower vs. C. B. & Q. R. R. Co.,* 59 Ia. 563, 13 N. W. 718; *Chicago Co. vs. People,* 153 Ill. 409, 38 N.E. 1075; *Fort Street Union Dept. Co. vs. Morton,* 83 Mich. 265, 47 N. W. 228; *Calor. Oil & Gas Co. vs. Franzell,* 33 Ky. Law. 98, 109 S. W. 328; *Riley vs. Charleston Union St. Co.,* 71 S. C. 457, 51 S. E. 485; *Ryan vs. Louisville & N. Terminal Co.,* 102 Tenn. 111, 50 S. W. 744; *Southern Ill. & M. Bridge Co. vs. Stone,* 174 Mo. 1, 73 S. W. 453; *Southern Ill. & M. Bridge Co. vs. Stone,* 206 U. S. 267, 51 L. Ed. 1057; *State ex rel. Dominick vs. King*

County Superior Court, 52 Wash. 196, 100 Pac. 317; *State ex rel. Trimble vs. Superior Court,* 31 Wash. 445, 72 Pac. 89.

In *State ex rel. Dominick vs. King County Superior Court, supra,* the court said:

> "Does the fact that the respondent will sell and deliver a portion of its electrical power to third persons and corporations to be by them used for public and municipal rights and in the operation of railroads and railways, afford a sufficient reason for denying to it the right of eminent domain? We think not. Courts look to the substance rather than to the form, to the end rather than to the means. If in the end the property is to be devoted to a public use, the manner, agency or instrumentality through which that result is accomplished is a matter of no concern."

Cases involving analogous situations have been decided by this court.

In the case of *Clark vs. Nash,* 198 U. S. 361, 49 L. Ed. 1085, a statute of Utah authorizing the taking of private property for an irrigation ditch, was upheld, the court holding that the use was a public one, although for the benefit of only one land owner. The court in that case recognized a principle which it has adhered to closely ever since: that the character of the use, whether public or private, depends largely upon local conditions, with which the people of the particular state are more familiar than anyone else,

and consequently the Federal Supreme Court should be slow to declare a use private which local statutes and decisions recognize as public. The court said:

> "But whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious, and acknowledged in the state, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the state which, in all probability, would flow from a denial of its validity. These are matters which

might properly be held to have a material bearing upon the question whether the individual use proposed might not in fact be a public one. It is not alone the fact that the land is arid and that it will bear crops if irrigated, or that the water is necessary for the purpose of working a mine, that is material; other facts might exist which are also material—such as the particular manner in which the irrigation is carried on or proposed, or how the mining is to be done in a particular place where water is needed for that purpose. The general situation and amount of the arid land or of the mines themselves might also be material, and what proportion of the water each owner should be entitled to; also the extent of the population living in the surrounding country, and whether each owner of land or mines could be, in fact, furnished with the necessary water in any other way than by the condemnation in his own behalf, and not by a company, for his use and that of others."

The case of *Strickley vs. Highland Boy Gold Mining Co.,* 200 U. S. 527, 50 L. Ed. 581, was begun by a mining corporation in Utah to condemn a right of way for an aerial bucket line and supporting towers across a placer mining claim. A statute of Utah provided that the right of eminent domain might be exercised for tramways, etc., "to facilitate the milling, smelting, or other reduction of ores, or the working of mines." The mining corporation desired to use the line to carry ores for itself and others from its mines. The court said :

"The question, thus narrowed, is pretty nearly answered by the recent decision in *Clark vs. Nash,* 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676. That case established the constitutionality of the Utah statute, so far as it permitted the condemnation of land for the irrigation of other land belonging to a private person, in pursuance of the declared policy of the state. In discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent. In such unusual cases there is nothing in the Fourteenth Amendment which prevents a state from requiring such concessions. If the state constitution restricts the legislature within narrower bounds, that is a local affair, and must be left where the state court leaves it in a case like the one at bar.

"In the opinion of the legislature and the Supreme Court of Utah the public welfare of that state demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong. If, as seems to be assumed in the brief for the defendant in error, the finding that the plaintiff is a carrier for itself and others means that the line is dedicated to carrying for whatever portion of the public may desire to use it, the foundation of the argument on the other side disappears."

On March 12, 1906, this court handed down a direct holding that a state statute, giving mill owners the right to construct dams and overflow property to develop water power for manufacturing purposes, is valid and does not contravene the Fourteenth Amendment. *Otis Co. vs. Ludlow Mfg. Co.,* 201 U. S. 140, 50 L. Ed. 696. The court said:

> "The only question which it is necessary for us to consider is whether the act as construed violates the Fourteenth Amendment. *General objections to mill acts as taking property for private use or on other grounds have been disposed of by Head vs. Amoskeag Mfg. Co.,* 113 U. S. 9, 28 L. Ed. 889, 5 Sup. Ct. Rep. 441. See further, *Clark vs. Nash,* 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676; *Strickley vs. Highland Boy Gold Mining Co.,* 200 U. S. 527, *ante,* 581; 26 Sup. Ct. Rep. 301. Such acts have been in force in Massachusetts ever since an act of 1714, chap. 15, 1 Prov. Laws, 729. The practice sanctioned by them would seem, from the recitals of that act, to have been still older. It may have begun with grist mills and may have had its justification in the public needs which exempted from military watchings and wardings one miller to each grist mill (act of 1693, chap. 3, Par. 13, 1 Prov. Laws, 130); and in the public duties which were expressed in the act of 1728, chap. 6, Par. 3, 1 Prov. Laws, 497. But, at all events, the liability of streams to this kind of appropriation and use has become so familiar a conception in New England, where water power plays as large a part as mines in Utah, that it would not be very extravagant to say that it enters as an incident into the nature of property in streams, as there understood."

In *Mount Vernon-Woodberry Cotton Duck Co. vs. Alabama Interstate Power Co.*, 240 U. S. 30, 60 L. Ed. 507, the court says:

> "The principal argument presented that is open here, is that the purpose of the condemnation is not a public one. *The purpose of the Power Company's incorporation, and that for which it seeks to condemn property of the plaintiff in error, is to manufacture, supply, and sell to the public, power produced by water as a motive force.* In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. *But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is.* The inadequacy of use by the general public as a universal test is established. *Clark vs. Nash*, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; *Strickley vs. Highland Boy Gold Min. Co.*, 200 U. S. 527, 531, 50 L. Ed. 581, 583; 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174. The respect due to the judgment of the state would have great weight if there were a doubt. *Hairston vs. Danville & W. R. Co.*, 208 U. S. 598, 607, 52 L. Ed. 637, 641, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; *O'Neill vs. Leamer*, 239 U. S. 244, 253, *ante*, 249, 265, 36 Sup. Ct. Rep. 54. *But there is none.* See *Otis Co. vs. Ludlow Mfg. Co.*, 201 U. S. 140, 151; 50 L. Ed. 696, 705; 26 Sup. Ct. Rep. 353."

Hairston vs. Danville & W. R. Co., 208 U. S. 598, 52 L. Ed. 637, was an action to condemn a right of way for a spur track. Discussing the contention that the condemnation was not for a public use, the court said:

> "The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected. . . . The propriety of keeping in view by this court, while enforcing the Fourteenth Amendment, the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justified and acted upon in *Fallbrook Irrig. District vs. Bradley; Clark vs. Nash;* and *Strickley vs. Highland Boy Gold Min. Co., ubi supra.* What was said in these cases need not be repeated here. No case is recalled where this court has condemned, as a violation of the Fourteenth Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws. In *Missouri P. R. Co. vs. Nebraska, ubi supra,* it was pointed out (p. 416) that the taking in that case was not held by the state court to be for public uses. We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for

> which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people. We have found nothing in the Federal Constitution which prevents the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch; of a right of way over the land of another for an aerial bucket line; *or of the right to flow the land of another by the erection of a dam.*"

In another spur track case, *Union Lime Co. vs. C. & N. W. R. Co.*, 233 U. S. 211, 58 L. Ed. 924, the court said:

> "The state through its highest court declares the use to be a public one and we should accept its judgment unless it is clearly without ground."

III. The transmission of power generated at Lake Chelan in the State of Washington into the State of Idaho is not an issue in this case, both the trial and the State Supreme Court having found as a fact that none of the Chelan power will be used in Idaho.

The trial court found that none of the electric energy to be generated by respondent at its projected plant will be used in Idaho. (T. 57.) Upon appeal the Supreme Court of Washington affirmed this finding. *State ex rel. Woodruff, et al. vs. Superior Court, supra* (T. 143), 145 Wash. 129, 137; 259 Pac. 379, 382; *State ex rel. Chelan Electric Co. vs. Superior Court of Chelan County* (Getty case), 142 Wash. 270, 253 Pac. 115.

The use was held to be a public use within the meaning of the Constitution and statutes of the State of Washington, because all of the electric energy was to be used within that state.

Appellant says the respondent intends to transmit the power into the State of Idaho, notwithstanding the contrary conclusion of the state court. (Tr. 57, 263, 264.) Under such circumstances, it will be presumed that there was evidence tending to support the finding of the lower court. *Hanson vs. Boyd*, 161 U. S. 397, 40 L. Ed. 746; *Clarke vs. Pennsylvania*, 139 U. S. 395, 32 L. Ed. 497; *Coppuntan vs. Savage*, 14 Wall. 776, 20 L. Ed. 862.

If the evidence were certified it would be found to be conflicting. In the opinion of the Supreme Court of Washington in the case at bar it is stated:

> "Further, it is said that the use is a private use and that there is no right or power of eminent domain, because the electric energy produced at the Lake Chelan plant will be used in Idaho. The same contention was made in the *Getty* case. (*State ex rel. Chelan Electric Co. vs. Superior Court*, 162 Wash. 270; 298 Pac. 113.) . . . Admitting the record and conclusion in that case, relators now say that the proof is different in the present case, that they have now furnished additional evidence in support of their claim. But, as has the condemnor introduced evidence additional to that it relied on in the other case, and upon all

> of it, *conflicting as it is,* the trial court has again found that none of the energy so produced will flow into Idaho."

This court has steadfastly refused to weigh conflicting testimony. *Great Northern Ry. Co. vs. Donaldson,* 246 U. S. 121, 62 L. Ed. 616; *U. S. vs. Johnstone,* 268 U. S. 220, 69 L. Ed. 925.

The highest court of the state having declared the use to be a public use, and the evidence not having been incorporated in the record, this court will accept the judgment of the state court, there being nothing upon which to base a finding that the decision of the lower court is clearly without ground. *Clark vs. Nash,* 198 U. S. 361, 49 L. Ed. 1085; *Union Lime Co. vs. C. & N. W. R. Co.,* 233 U. S. 211, 58 L. Ed. 924; *Fallbrook Irrigation District vs. Bradley,* 164 U. S. 112, 41 L. Ed. 369; *Hairston vs. D. & W. R. Co.,* 208 U. S. 598, 52 L. Ed. 637.

IV. All of the Chelan Power Will Be Devoted to Public Uses.

Under the heading "whether the purpose of the taking constituted a public use" the appellant has argued the negative, contending that it is not a public use because the Washington Water Power Company, another public service corporation, rather than respondent, is to distribute the power, and that some of the power is to be used in Idaho. The contention

is not made directly that the use to be made of the power, as found by the state court, aside from the two uses just mentioned, is not a public use within the meaning of the Constitution of the United States. However, because of the importance of the question, we will refer briefly to the authorities on this point.

The trial court found that the Washington Water Power Company will distribute for the petitioner the electric energy to be generated at Lake Chelan; that the Washington Water Power Company furnishes electric energy to corporations operating lines of railroad and electric railways in towns, cities and counties of the State of Washington; that it furnishes electric energy for municipalities of the state, lighting the streets and avenues, houses and homes thereof; that it has a contract to supply the Great Northern Railway Company with electric energy to operate its trains as soon as it electrifies between Wenatchee, Washington, and Troy, Montana; that it supplies electric energy for other public uses (many of which are enumerated in the companion case heretofore referred to as the *Getty* case (*State ex rel. Chelan Electric Co. vs. Superior Court,* 142 Wash. 270; 253 Pac. 115); that in the years 1925 and 1926 the power produced by the hydro-electric plants of the Washington Water Power Company was insufficient to supply the

needs of its customers and that it was obliged to purchase power from other companies in order to avoid a shortage. (T. 55.) The court then finds:

> "That the entire output of electric energy distributed and sold, and to be distributed and sold by the Washington Water Power Company, including the power to be produced by the proposed hydro-electric plant on the Chelan River, is, and will be devoted to a public use, and the object for which the lands, real estate, premises and property of the respondents are sought to be appropriated is, and will be a public object and use, and the public interest requires and will require the prosecution of the enterprise of the petitioner." (T. 59.)

The evidence not having been certified to this court, there is nothing before the court upon which it can review the question of public use. Under these circumstances it will be presumed that there was evidence to support the finding of the lower court. *Hansen vs. Boyd, supra; Clarke vs. Pennsylvania, supra; Capperton vs. Bowyer, supra.*

The highest court of the state having declared the use to be a public use, and the evidence not having been incorporated in the record, this court will accept the judgment of the state court, there being nothing upon which to base a finding that the decision of the lower court is clearly without ground. *Clarke vs. Nash, supra; Union Lime Co. vs. C. & N. W. R. Co.,*

supra; Fallbrook Irrigation District vs. Bradley, supra; Hairston vs. D. & W. R. G. Co., supra.

This court regards with great respect the judgments of state courts upon what should be deemed public uses in any state. *Rindge Co. vs. Los Angeles County,* 262 U. S. 700; 67 L. Ed. 1186, 1192.

In the case of *Hairston v. Danville & W. R. Co.,* 208 U. S. 598; 52 L. Ed. 637, it is said:

> "No case is recalled where this court has condemned, as a violation of the 14th Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws."

The contention was made in the *Getty* case that the uses appellant intends to make of the Chelan power are not public uses. The decision of the Supreme Court of Washington on that question in the *Getty* case and again in the case at bar makes the finding of public use in those cases the established law of that state.

> *State ex rel. Chelan Electric Co. vs. Superior Court,* 142 Wash, 270; 253 Pac. 115. (For decision in case at bar see T. 142.)

Article XXI of the Constitution of the State of Washington provides:

> "The use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use."

The holding in *State vs. White River Power Company,* 39 Wash. 648; 82 Pac. 150 (relied on by appellant) that the above provision of the constitution of the state of Washington, in so far as it might be construed as authorizing condemnation for manufacturing purposes, was in conflict with the 14th Amendment to the constitution of the United States, has been modified and changed by the later decisions of the state court in *State ex rel. Chelan Electric Co. vs. Superior Court, supra,* and *State ex rel Woodruff vs. Superior Court, supra,* (T. 142) and is no longer the law in Washington.

The early decisions in *Kaukauma Water Power Co. vs. Green Bay Canal Co.,* 142 U. S. 254; 35 L. Ed. 1004, and *Missouri Pacific vs. Nebraska,* 164 U.S. 403; 41 L. Ed. 489, relied upon by the Supreme Court of Washington in the *White River* case have been clarified by the later decisions of this court in *Clark vs. Nash, supra; Strickley vs. Highland Boy Gold Mining Co,. supra; Otis Co. vs. Ludlow Mfg. Co., supra; Mount Vernon-Woodberry Cotton Duck Co. vs. Alabama Interstate Power Co., supra; Hendersonville Light & Power Co. vs. Blue Ridge Interurban Ry. Co.,* 243 U. S. 563; 61 L. Ed. 900; *Hairston vs. Danville & W. R. Co., supra; Union Lime Co. vs. C. & N. W. R Co., supra.*

The State of Washington possesses one-sixth of the total water power of the United States (*State ex rel Chelan Electric Co. vs. Superior Court,* 142 Wash. 270, 281; 253 Pac. 115, 119). Its future growth and prosperity must rest in a large degree upon the development of that resource. Enlightened public thought agrees that the best interests of the public are preserved by allowing such development to be made by public service corporations under public regulation. The respondent (petitioner) and the prospective distributor of the power in the present case are of that class.

The Federal Water Power Commission (T. 159-175), the Supervisor of Hydraulics and the Board of State Land Commissioners of the State of Washington (T. 50, 60, 61) have approved the project. It has been declared to be for a public use by the highest court of the state. The objections now made by the one remaining litigant out of the large number that originally contested the right of respondent to condemn are not so much to prevent the power development as to obtain by coercion a higher price for her property than a jury would award. It is respectfully submitted that, with the support of the state constitution and the action that has been taken by the Federal government and coordinate branches of the govern-

ment of the State of Washington, and under the decisions of the Supreme Court of Washington in this and companion cases, and in view of the more recent decisions of this court, it should be held (if the court finds that it can pass upon this question at all in the absence of a transcript of the evidence) that the use which respondent intends to make of appellant's property is a public use within the meaning of the constitution of the United States.

V. The description of appellant's land is sufficiently definite, whether service was made personally or by publication.

Appellant argues that the description of the property sought to be condemned is insufficient, in that the notice and petition do not describe the same with reasonable certainty and that for this reason she was deprived of her property without due process of law.

The notice and petition recite, in substance, that it is necessary that the petitioner "acquire the perpetual right to impound the waters of Lake Chelan and the Chelan River, and to raise the same to the maximum elevation of 1100 feet above mean sea level, and to inundate and overflow to the maximum elevation of 1100 feet above mean sea level, the following described real estate situated in the County of Chelan, State of Washington, particularly described as follows, to-wit." And then follows a detailed description of the

property which petitioner seeks the right to overflow to the said elevation. (T. 15-18; 3-9.)

In the last paragraph of the notice (and paragraph 7 of the petition) it is recited "that the object of said proceeding is to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by the petitioner . . . for the taking or injuriously affecting the lands, real estate and other premises above described, in the manner set forth in said petition, and for a release from all liability for all damages to said lands, real estate and premises, in any manner arising from the *impounding* and *storing* of the waters of said Lake Chelan and the Chelan River and raising the same to the maximum elevation of 1100 feet above mean sea level." (T. 15-18.) The prayer of the petition is in conformity with these recitations in the notice. (T. 3-9.)

Appellant complains that the notice flagrantly disregards a statute of the State of Washington requiring that the notice contain "a description of the land" sought to be appropriated. (Appendix 55, Appellant's Brief.) Two months before the trial on the question of damages, in compliance with a motion made by appellant, a bill of particulars was furnished giving a surveyor's description by metes, bounds, courses, de-

grees, angles and acreage of the property sought to be condemned. The description covers over six full pages of the printed transcript. (T. 39-41. 75-81.)

By the order of public use and necessity (T. 63, 64) the respondent was given "the right in perpetuity, to inundate and overflow to the maximum elevation of 1100 feet, *still water measurement,* above mean sea level," the lands described in the notice and petition "together with the right in perpetuity, to damage the above described land by wave wash, erosion, seepage, inundation or any similar cause as a result of holding the waters of Lake Chelan up to a maximum elevation of 1100 feet, *still water measurement,* above mean sea level." A bill of particulars having been furnished before trial giving a metes and bounds description of the land to be actually overflowed, the judgment on the verdict compensates the appellant for damages to her land actually overflowed and for damage to contiguous lands (which were included in the description contained in the original notice and petition as well as in the bill of particulars) by wave wash, erosion, seepage, inundation or any similar cause. (Tr. 101, 102, 104, 105, 114, 115, 125-133.)

With respect to appellant's contention that the description contained in the published notice was insufficient to give the court jurisdiction the Supreme Court of Washington says:

"It is assigned that the property in each case is not described with reasonable certainty and that therefore the trial court obtained no jurisdiction. The descriptions are long and need not be set out in this opinion. An examination of them, however, satisfies us that they are sufficient to satisfy all questions of jurisdiction as the same affects the rights of resident owners upon whom personal service was had, or the rights of any non-resident owner upon whom service was had by publication of notice. In substance the descriptions are like the one held to be sufficient in the *Getty* case. (*State ex rel. Chelan Electric Co. vs. Superior Court,* 142 Wash. 270; 253 Pac. 115.) In this connection it is further claimed that the court erred in denying motions to make the petitions more definite and certain. It appears, however, that with such motions the relators filed motions for bills of particulars for the same purpose and that the order denying the first motions granted the second ones which have been complied with by the petitioner by the giving of minute detailed descriptions by metes and bounds in each and all of the cases of the lands to be flooded." (T. 144.)

State ex rel Woodruff vs. Superior Court, 145 Wash. 129; 259 Pac. 379.

In its decision the Supreme Court of Washington was interpreting a state statute. While Sec. 921 Remington's Compiled Statutes of Washington (Appendix p. 98), requires that the petition describe the lands sought to be condemned "*with reasonable certainty*" Sec. 922 (Appendix, p. 99), merely requires that a notice be served "*containing a description of the land.*" The decision of the Washington Supreme Court on this question is to the effect that the description in the notice is sufficiently definite to comply with the Washington statute. The construction given to a statute of a state by the highest tribunal of such state is regarded as a part of the statute and is as binding upon the courts of the United States as the text. *N. P. Ry. Co. vs. Meese, supra; C. & N.W.R. Co. vs. Nye Schneider-Towler Co., supra; Tullis vs. S.W. & W. R.R. Co., supra; Bucher vs. Cheshire Ry., supra; Leffingwell vs. Warren, supra.*

The Supreme Court of Washington did not hold, and there is nothing in the record to show that it was asked not to hold, that the description of the land in the notice was sufficient to constitute due process under the constitution of the United States. But assuming for the sake of argument that the state court did decide this federal question, under the principles stated in the authorities already cited, the description in the notice was sufficient to constitute due process.

"The test is whether the publication was of such a character as to create a reasonable presumption that if the owner is present and taking care of his property, he will receive the information of what is proposed and when and where he may be heard."

G. N. Ry. vs. City of Minneapolis, 161 N. W. 231, 233.

"The purpose of notice is to secure to the owner the opportunity to protect his property from the lien of the proposed tax or some part thereof. In order to be effectual it should be so full and clear as to disclose to persons of ordinary intelligence in a general way what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property, will receive the information of what is proposed, and when and where he may be heard."

Bellingham Bay & B. C. Railroad Co. vs. City of New Whatcom, 172 U. S. 314, 319; 43 L. Ed. 460.

"Of what concerns, or may concern their real estate, men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises."

Ballard vs. Hunter, 204 U. S. 241, 262; 51 L. Ed. 461, 474.

See also:

Huling vs. Kaw Valley R. & Imp. Co., 130 U. S. 559; 32 L. Ed. 1045; *Windsor vs. McVeigh,* 93 U. S. 274; 23 L. Ed. 914; *Goodrich vs. Ferris,* 214 U. S. 71; 53 L. Ed. 914; *Chehalis vs. Centralia,* 77 Wash. 673, 676; 138 Pac. 293; *Spokane Valley Land & Water Co. vs. Jones,* 53 Wash. 37, 43; 101 Pac. 515; *C. & A. R. Co. vs. Pontiac,* 48 N. E. 485; *State ex rel. Burrows vs. Superior Court,* 48 Wash. 277, 281; 93 Pac. 423; *Empire Mill Co. vs. Dist. Co.,* 149 Pac. 499, 503; 2 *Lewis on Eminent Domain* (3rd Ed.), Sec. 549, p. 981.

The due process clause of the constitution of the United States does not require any particular style, form or length of notice. What is required is that a party shall have reasonable notice and an opportunity to be heard before the issues are decided against him. 12 *Corpus Juris,* page 1232. We submit the notice in this case was reasonable both as to length of time and as to description and that it not only gave appellant an opportunity to be heard upon the issues, but that she made the best of the opportunity by appearing in the action three days before she was required to do so. When she did appear she asked for a more definite description and received it.

VI. Form of Decree. Measuring Elevation of Lake at Still Water.

The nature of the rights upon appellant's land sought to be condemned, as described in the notice and petition, are discussed in the preceding subdivision of this brief. Appellant objects because when the bill of particulars was filed the respondent asked that the elevation of the lake be measured at still water, and complains because this issue was submitted to the jury and damages awarded upon this basis. (T. 104, 105, 114, 115, 125, 127.)

The description in the original notice and petition is of all appellant's lands abutting upon the shore of the lake and the object of the proceeding is stated in the notice to be, and the prayer of the petition is, that respondent be granted the right to overflow and inundate this tract of land to the 1100 foot elevation above mean sea level and for a release from all liability for damages to the entire tract resulting from thus impounding and storing the waters of the lake. (T. 15-18; 3-9.) In the bill of particulars this 1100 foot elevation is definitely located by measuring the lake at still water and it is stated that respondent seeks the right to damage contiguous land (being the remainder of the tract described in the original notice and petition lying immediately above the 1100 foot elevation)

by wave wash, erosion, seepage, inundation, or any similar cause as a result of impounding and storing the waters of the lake to the 1100 foot elevation measured at still water.

The object of the action stated in the notice, and the prayer of the petition, is to *impound* and *store* the waters of the lake to the elevation mentioned. It is a self evident fact that waters could not be impounded and stored to that elevation if they were to be measured at the crest of the highest wave in the roughest water. In other words, if the lake had to be kept down to a level which would prevent the highest wave in the roughest water from ever going above the 1100 foot elevation the waters of the lake would have to be impounded and stored at an elevation somewhat below 1100 feet. Since all that is required is that a property owner be given reasonable notice of the object of the action we respectfully submit the statement of the purpose of the proceeding being to acquire the right to *impound* and *store* the waters of Lake Chelan to the elevation of 1100 feet was sufficient notice to the appellant that it was intended to measure the elevation at still water.

It is a matter of common knowledge that engineers measure the elevation of a body of water by placing their measuring instrument within a box arranged in

such manner that the water within the box is still, although the surface of the water outside the box be rough and choppy.

To give to the language of the notice and petition its common and every-day meaning "to impound and store water and raise it to a maximum elevation of 1100 feet" means to confine it within an inclosure until it reaches an elevation of 1100 feet. Webster's International Dictionary so defines the word impound and defines the word pound as a "level stretch in a canal between locks." Both definitions convey the idea that the elevation is to be measured when the water is still.

Article VIII of the Federal Power License provides:

> "For the purpose of determining . . . . the amount of water held in and drawn from storage the licensee shall install and thereafter maintain a standard gauge or gauges as may be necessary to determine the variation of the level of Chelan Lake and the rates and volume of discharge of water therefrom." (T. 165.)

This question is relatively unimportant. Appellant was compensated upon the basis of 1100 feet still water measurement. (T. 115, 125-133.) She was not deprived of any substantive right but seizes upon this trifling technicality to obtain a reversal. The law does

not concern itself with trifles and we submit the trial court's interpretation of the notice and petition were reasonable and proper.

VII. Instructions Given and Refused.

Appellant complains on pages 43 and 44 of her brief of the giving of certain instructions by the trial court and the refusal to give instructions requested by appellant.

If there was error in the instructions or in the conduct of the trial, it cannot be made a ground of setting aside the decree if the court had acquired jurisdiction to render the decree. Error or irregularities in the suit do not take from it or its decree the attribute of due process. *Ballard vs. Hunter,* 204 U. S. 241, 255; 51 L. Ed. 461, 471, 474; *Central Land Co. vs. Laidley,* 159 U. S. 103, 40 L. Ed. 91.

The evidence to which these instructions might be applicable is not in the record. Their validity depends upon an examination of the testimony. Contentions which relate to occurrences at the trial cannot be considered in the absence of the evidence. The incorporation of the instructions into the record does not require their consideration by the court. The appellate court presumes that the charge was correct and responsive to the issues as developed by the evidence.

Jones vs. Buckell, 104 U. S. 554; 26 L. Ed. 841, *Met. R. R. Co. vs. Macfarland,* 195 U. S. 322, 49 L. Ed. 219; *U. S. ex rel. Kinney vs. U. S. F. & G. Co.,* 222 U. S. 283; 56 L. Ed. 200, *Krauss Bros. Lbr. Co. vs. Mellon,* 18 Fed (2nd) 369, *Dangelo vs. McLean Fire Brick Co.,* 287 Fed. 14, *Sharp vs. U. S.,* 280 Fed. 86, 89; *South Penn. Co. vs. Latshaw,* 111 Fed. 598; *Newport News & Old Point Ry. & Electric Co. vs. Yount,* 136 Fed. 589; *Duluth St. Ry. Co. vs. Speaks,* 204 Fed. 573.

VIII. The state court did not deny the right of removal. The constitutionality of the tax statutes of the State of Washington is not an issue.

One of the grounds of reversal relied upon by appellant is the alleged denial of the right of removal. This question is discussed in subdivision 4 of appellant's brief under the heading, "Whether the tax statutes are in conflict with the Constitution of the United States," it being appellant's contention that the effect of the tax statutes, as interpreted by the Supreme Court of the State of Washington, was to deny to her the right of removal granted by the Constitution of the United States.

The facts with reference to the question of removal are briefly as follows: Three days before the return day fixed in the notice appellant filed a special appearance and motion to quash. (T. 3, 13.) Fourteen days later (eleven days after the return day) ap-

pellant filed a notice, petition and bond for removal to the federal court. (T. 20, 24.) An order of removal was entered by the state court eight days later. T. 24.) Four days later (November 3, 1926) the federal court remanded the cause to the state court. (T. 34.)

The case was then continued from time to time until February 28, 1927 (T. 35, 36.) On the latter date appellant's motions to quash and to make the petition more definite and certain were denied and her demurrer overruled. (T. 41, 43.) The case was then tried on the question of public use and necessity, findings of fact, conclusions of law and a decree being entered by the trial court March 23, 1927. (T. 45-64.) On April 29, 1927 the Supreme Court of Washington ordered that a writ of certiorari issue to review the decision of the lower court on this question. (T. 194.)

While this phase of the case was before the Supreme Court (that question not being decided by the higher court until September 1, 1927 (T. 142), the case proceeded to trial in the lower court on the question of damages. The trial was begun June 23 and continued without objection on the part of appellant, and without a special appearance having been made by appellant, until noon of June 27 at which time respondent rested its case. Appellant immediately filed a

second petition and bond for removal without serving written notice of the same upon respondent. This second petition for removal was orally denied by the court on June 27 and a formal order entered denying the same on the following day. (T. 92-95.)

The second petition for removal (T. 86-89) is substantially identical with the first. (T. 20-23.) In both petitions it is alleged that:

> "The other respondent in said cause is Chelan County, Washington, a municipal corporation, and a citizen of the State of Washington; that said Chelan County is not a tenant, lienor, or encumbrancer, and has no right, title, interest or estate whatsoever in any of the land, real estate or other premises owned by said Alice Barbee Wick; that there are no taxes or other amounts due and owing by said Alice Barbee Wick to said Chelan County, and that the controversy between said Chelan Electric Co. and said Alice Barbee Wick is a separable and distinct controversy between said Chelan Electric Company and said Alice Barbee Wick, your petitioner herein, who are citizens and residents of different states, which can be wholly determined between said Chelan Electric Company and said Alice Barbee Wick without the presence in this action of said other respondent, viz.: said Chelan County, Washington, a municipal corporation."

The evidence has not been certified to this court and therefore all that is known of what took place at the trial must be gleaned from the papers filed in the case and the orders of the court.

The action is brought by Chelan Electric Company, a corporation of the State of Washington, against Alice Barbee Wick and Chelan County, Washington, a municipal corporation. In the petition it is alleged as required by Section 921, Remington's Compiled Statutes of Washington, that the names of each and every owner, encumbrancer and person or party interested in the property are "Alice Barbee Wick and Chelan County, Washington, a municipal corporation." (T. 3, 8.) These allegations were never stricken from the petition.

Chelan County has not been dismissed as a party either by the court or voluntarily by respondent Chelan Electric Company. Chelan County appeared by its counsel at the trial on the question of public use as well as at the trial on the question of damages. (T. 45, 125, 126.) The county joined in the motion made in the first removal proceedings to remand the case to the state court. (T. 25-27, 32, 33, 34.) The county filed objections to the second petition for removal on the ground, among others, that "the controversy is not one wholly between citizens of different states, that it is not a separable controversy, that Chelan County is a lienor or encumbrancer upon, and has a right, title, interest and estate in, the lands, real estate and premises owned by the said Alice Bar-

bee Wick, and sought to be taken in these proceedings" and that the county is further interested on account of the country road. (T. 175, 176.)

In the petition for removal there is no allegation of fraudulent joinder. In the order denying the second removal the court finds that there has been no fraudulent joinder, that it is not a separable controversy, that written notice of the presentation of the petition was not served upon the respondent, that Chelan County is a necessary and indispensable party, that the case had been removed once before and remanded and that no change in the status of the parties had occurred since its remand. (T. 95.)

After the second petition for removal was denied the trial proceeded with the introduction of evidence by appellant. The court instructed the jury how to ascertain and determine the compensation to be paid respondents (referring to both appellant and Chelan County by the general term "respondents," T. 101-108), the verdict was for full compensation "to be paid to the owners and all tenants, encumbrancers and others interested." (T. 114.)

In the certiorari proceedings before the Supreme Court of the State of Washington the appellant contended that Chelan County was improperly joined as a party defendant, depriving her of the right of

removal on account of diversity of citizenship. The Supreme Court held that two answers could be made to this contention:

> "First, at the time the action was commenced general taxes *due* the county were *outstanding and a lien* upon the property" and that the state statute requires "the petition in eminent domain cases to set forth the name of each and every owner, encumbrancer or other person or party interested in the property" and that a copy be served upon each and every such person and, "second, the record shows that prior to the hearing herein by the trial court, relator Wick did remove the case against her to the federal court and, upon a hearing therein, that court promptly remanded the cause to the state court." (T. 145.)

On the appeal to the Supreme Court of Washington from the judgment on the verdict the appellant urged that it was error for the trial court to deny the second petition for removal. The Supreme Court again affirmed the trial court, holding that the second application was neither properly nor timely made, that the appellant did not give written notice of the filing of the petition as required by statute, that the case was non-removable on the petition when the action was commenced and could not be converted into a removable case except by the voluntary dismissal of Chelan County by the petitioner, that the case had been removed once and remanded and that

there was no claim of fraudulent joinder of parties defendant for the purpose of preventing removal.

Appellant contends that she was deprived of the removal by a tax statute of the State of Washington making taxes which had been levied but were not yet due and payable a lien upon the property. But this question is in no way involved in this case. The Supreme Court of the State of Washington finds that *"at the time the action was commenced general taxes due the county were outstanding and a lien upon the property"* and then interpreting the eminent domain statutes of the state, finds the county to have been a necessary and indispensable party. (T. 145, 205.) These conclusions of fact by the court of last resort of the State of Washington are not subject to re-examination by this court. *Louisville & N. R. Co. vs. Schmidt,* 177 U. S. 230, 337; 44 L. Ed. 747, 750; *C. M. & St. P. Ry. Co. vs. Risty,* 276 U. S. 567; 72 L. Ed. 703; *Knights of Pythias vs. Meyer,* 265 U. S. 30, 33; 68 L. Ed. 885, 888; *Saltonstall vs. Saltonstall,* 276 U. S. 260, 270; 72 L. Ed. 565, 568; *Carroll Co. vs. U. S.,* 18 Wall. 71, 82; 21 L. Ed. 771, 775.

The Supreme Court of Washington as well as other courts has held a tax lien to be an encumbrance and that the holder of a tax lien is a necessary party defendant in an eminent domain proceeding: *Green vs.*

Tidball, 26 Wash. 338; 67 Pac. 84; *North Coast Ry. vs. Hess,* 56 Wash. 335; 105 Pac. 853; *Linne vs. Bredes,* 43 Wash. 540; 86 Pac. 858; *DeVoe vs. Rundle,* 33 Wash. 604; 74 Pac. 836; 2 *Lewis on Eminent Domain,* (3rd Ed.), Sections 528, 535; *State vs. Easton & Amboy R. R. Co.,* 36 N. J. Law 181; *Logan vs. Luukinen,* 231 Pac. 184, 186 (Ore.).

The decision in *Gasaway vs. Seattle,* 52 Wash. 444; 100 Pac. 991, cited by appellant as authority for excluding Chelan County as a party defendant, arose under a special statute relating to cities which did not require that all encumbrancers be joined as parties defendant as is required by the statute involved in the case at bar.

Chelan County being a necessary and indispensable party under the laws of the State of Washington, the case was not separable as between it and the appellant Wick. Where the object of a suit is to condemn and appropriate to the public use a single tract of land, the controversy is not divisible because the two defendants own distinct interests and may be entitled to separate damages. One of them cannot remove the cause from the state court to the federal court. *Bellaire vs. B. & O. R. R. Co.,* 146 U. S. 117; 36 L. Ed. 910; *Kohl vs. U. S.,* 91 U. S. 367, 378; 23 L. Ed. 449, 453; *City of Washington vs. Columbus & C. N. R. Co.,*

53 Fed. 673; *C. & O. R. Co. vs. Cockrell,* 232 U. S. 146; 58 L. Ed. 544; *McCallister vs. C. & O. Ry.,* 243 U. S. 302, 310; 61 L. Ed. 735, 740; *Baker vs. Jacksonville Traction Co.,* 247 Fed. 718; *Maloney vs. Cressler,* 210 Fed. 104; *Beckwith vs. C. M. & St. P. Ry. Co.,* 223 Fed. 858; *Gulf & S. I. R. Co. vs. Gulf Refining Co.,* 260 Fed. 262; *Roberts vs. Underwood Co.,* 257 Fed. 583.

Counties are recognized as corporations and, being such, as citizens for the purpose of suits based on diverse citizenship in the federal courts: *Mercer vs. Cowles,* 7 Wall. 118; 19 L. Ed. 86; *Lincoln Co. vs. Luning,* 133 U. S. 529, 531; 33 L. Ed. 766; *Pearl R. Co. vs. Wyatt Lbr. Co.,* 270 Fed. 26; *Chicago etc. R. Co. vs. City of Spencer,* 283 Fed. 824; *Parks vs. Carriere Consol. School Dist.,* 12 Fed. (2nd) 37.

Appellant cannot claim error so far as the first removal proceedings are concerned, because the case was removed to the Federal court and remanded to the state court. An order of a federal district court remanding a cause to a state court is not subject to review by the Supreme Court of the United States, either directly or indirectly, or by a writ or error to the supreme court of a state. The action of the Federal District Court in remanding a cause is final and conclusive: *Matter of Matthew Addy Steamship Co.*

vs. Commerce Corporation, 256 U. S. 417; 65 L. Ed. 1027; *Pacific Live Stock Co. vs. Lewis,* 241 U. S. 440; 60 L. Ed. 1084; *Missouri Pacific Ry. Co. vs. Fitzgerald,* 160 U. S. 556, 581; 40 L. Ed. 536, 542; *McLaughlin Bros. vs. Hallowell,* 228 U. S. 278, 286; 57 L. Ed. 835, 839.

The first and second petitions for removal are identical. Appellant alleges facts indicating Chelan County was not a necessary party defendant. But the petition filed by respondent names "Chelan County, Washington, a municipal corporation" as one of the "owners, encumbrancers and persons or parties interested" in the property to be condemned.

The question of removability depends upon the allegations contained in the complaint or petition at the time the application for removal is made. A plaintiff may elect his own method of attack and the case which he makes in his complaint or petition determines the separable character of the controversy for the purpose of deciding the right of removal. If, under the state law, the case stated in plaintiff's complaint or petition is one in which the defendants are properly joined, this is decisive of the right of removal, there being no showing that the defendants were fraudulently joined for the purpose of preventing removal. *Wilson vs. Oswego Township,* 151 U. S.

56, 66; 38 L. Ed. 70, 75; *Torrence vs. Shedd,* 144 U. S. 527, 530; 36 L. Ed. 528, 531; *Brooks vs. Clark,* 119 U. S. 502-511; 30 L. Ed. 482, 485; *Brown vs. Trousdale,* 138 U. S. 389, 396; 34 L. Ed. 987, 990; *C. & O. R. Co. vs. Dixon,* 179 U. S. 131-140; 45 L. Ed. 121, 125; *Hayes vs. May Dept. Stores Co.,* 271 U. S. 318; 70 L. Ed. 965; *C. & A. R. Co. vs. McWhirt,* 243 U. S. 422, 425; 61 L. Ed. 826, 829; *McAllister vs. C. & O. Ry.,* 243 U. S. 302, 310; 61 L. Ed. 735, 741; *C. R. I. & P. Ry. vs. Dowell,* 229 U. S. 102; 57 L. Ed. 1090, 1095; *A. G. S. Ry. Co. vs. Thompson,* 200 U. S. 206, 214; 50 L. Ed. 441, 445; *L. & N. R. Co. vs. Wangelin,* 132 U. S. 599, 601; 33 L. Ed. 474, 475; *G. N. Ry. vs. Alexander,* 246 U. S. 276, 281; 62 L. Ed. 713, 716.

The petitions for removal do not contain any allegation of fraudulent joinder but even if there were such an allegation, the showing of fraudulent joinder must consist of a statement of the facts rightly leading to this conclusion, apart from the pleader's deductions. It is only in cases wherein the facts alleged in the petition for removal are sufficient to fairly raise the issue of fraud that the state court is required to surrender its jurisdiction. A petition for removal, insufficient upon its face, may be denied by the state court. *Wilson vs. Republic Iron & S. Co.,* 257 U. S. 92, 97; 66 L. Ed. 144, 148; *C. & O. R. Co. vs. Cockrell,*

232 U. S. 146, 152; 58 L. Ed. 544, 547; *Southern Ry. Co. vs. Lloyd,* 239 U. S. 496; 60 L. Ed. 402; *Ill. Central Ry. Co. vs. Sheegog,* 215 U. S. 308; 54 L. Ed. 208; *C. R. I. & P. Ry. vs. Dowell, supra.*

The right to remove a case to the federal court is not contingent on the aspect the case may have assumed on the facts developed on the merits of the issue tried. When there is a joint cause of action against a defendant resident of the same state with the plaintiff and a non-resident defendant, it must appear, in order to make the case removable as to the non-resident defendant, because of a dismissal as to the resident defendant, that the dismissal as to the resident defendant was voluntary on the part of the plaintiff and that as a result of such voluntary action the resident defendant is out of the case, leaving a controversy wholly between residents of different states. *Whitcomb vs. Smithson,* 175 U. S. 635; 44 L. Ed. 303; *Kansas City S. B. Ry. Co. vs. Herman,* 187 U. S. 63; 47 L. Ed. 76; *Lathrop etc. Co. vs. Interior Const. Co.,* 215 U. S. 246; 54 L. Ed. 177; *Southern Ry. Co. vs. Lloyd,* 239 U. S. 496; 60 L. Ed. 402; *American Car & Fdry Co. vs. Kettelhake,* 236 U. S. 311; 59 L. Ed. 594; *Key vs. Western Kentucky Coal Co.,* 237 Fed. 258; *Springer vs. American Tobacco Co.,* 208 Fed. 199.

Chelan County was not dismissed as a party defendant either by the respondent or by the court. The county has appeared throughout by counsel and has urged at all times that it is entitled to be heard and that the case should not be removed. The situation did not change between the filing of the first and the second removal petitions. It is true that respondent had introduced its evidence on the question of damages before the second petition was filed. The evidence has not been certified to this court and therefore what was proved is not shown, but the record does show that Chelan County remained as a party defendant and the facts alleged in respondent's petition to condemn appellant's property, which is the test upon the filing of the petition for removal, were just the same at the time the second petition was filed as they were at the time the first was filed and the case removed and remanded.

The denial by a state court of a second petition to remove a cause to a federal court does not deny any federal right within the meaning of the statutes of the United States governing the appellate jurisdiction of the Federal Supreme Court where the state court did no more than bow to the decision and order of the federal court in the first removal proceedings, remanding the cause to the state court. *McLaughlin Bros. vs. Hallowell,* 228 U. S. 278; 57 L. Ed. 835.

Appellant claims Chelan County was joined as a party defendant merely because of a tax lien held by it on the property sought to be condemned. The order of the court denying the second petition for removal states that the appellant discharged this lien by paying the taxes on March 12, 1927 and that she then proceeded to trial on the 23rd of the following June without objection and at the close of respondent's evidence on June 27th filed a second petition for removal. (T. 94.) Even though a case could be made removable during the course of the trial without the voluntary dismissal by the plaintiff of the resident defendant whose joinder theretofore prevented removal, appellant's right to remove would have been lost by her delay in presenting the petition. *Golden vs. N. P. Ry. Co.,* 104 Pac. 549; 220 U. S. 625; 55 L. Ed. 614; *N. P. Ry. Co. vs. Austin,* 135 U. S. 315; 34 L. Ed. 218.

Although the evidence has not been brought to this court, the record shows that the county was also interested in two county roads across appellant's property, one of which had been vacated and the other established to take the place of the one vacated. T. 24-26, 93, 144, 175, 176, 102, 103.) At any rate the allegations of the plaintiff, in the absence of a claim of fraudulent joinder, determine the removability of the case. Chelan County, Washington, a municipal

corporation, is named in the petition as one of the defendants on account of its being an owner, encumbrancer and person or party interested in the property sought to be condemned (T. 8), and the Supreme Court of Washington has found, and on this question its conclusion is final, that the county was a necessary and indispensable party defendant.

The second petition for removal was filed without notice to respondent or to the other defendant, Chelan County. (T. 95, 205.) The Judicial Code (Sec. 29, Ch. 231, Act of March 3, 1911, 36 Statutes at Large 1095) provides: "Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same." It has been held that this statute is mandatory and failure to give written notice prevents removal or, after removal, requires the cause to be remanded. *Goins vs. S. P. Ry. Co.,* 198 Fed. 432; *In re Vadner,* 259 Fed. 614; *Western Union Teleg. Co. vs. Oakley,* 227 S. W. 211; *Wanner vs. Bissinger,* 210 Fed. 96; *Arthur vs. Md. Casualty Co.,* 216 Fed. 386; *U. S. vs. Sessions,* 205 Fed. 502; *Loland vs. N. W. Stevedoring Co.,* 209 Fed. 626.

Appellant relies entirely for reversal on the alleged denial of the right to remove the case to the federal court on the contention that the Supreme Court of Washington interpreted the Laws of Washington

1893, Ch. 124, Sec. 79, p. 358, Sec. 88, p. 361; Laws of 1895, Ch. 176, Sec. 19, p. 516, Sec. 21, p. 520; Laws of 1897, Ch. 7, Sec. 78, p. 174, Sec. 83, p. 176; Laws of 1903, Ch. 59, Sec. 3, p. 74 (Sec. 11234, 11235, 11239, 11240, 11241, 11252, 11267 and 11272 Remington's Compiled Statutes of Washington), to mean the taxes levied in September 1926 were a lien on appellant's property from March 1, 1926, although they could not be paid until the first Monday in February, 1927, and that this interpretation of the tax statutes of the State of Washington prevented removal to the federal court, which amounted to the denial of a federal right granted by Article 3, Sec. 2, paragraph 1 of the Constitution of the United States (Assignment of Error VI, T. 152). The record does not show that this question was either submitted to or decided by the Supreme Court of the State of Washington. (T. 142, 148, 202, 206.) For that reason we will give it only brief consideration.

The statutory provisions attacked by the appellant were repealed long prior to the institution of this proceeding and were not before the State Supreme Court for consideration. In 1925 the Washington Legislature enacted a comprehensive tax code (Ch. 130, Laws of Washington, Extraordinary Session 1925), and repealed the previous statutes, including

the particular sections referred to by appellant. (See Appendix, p. 104.)

The question raised by appellant as to the effect of these two provisions is therefore not before the court. Section 104 of Chapter 130, Laws of Washington, Extraordinary Session 1925, provides:

> "The taxes assessed upon real property shall be a lien thereon from and including the 1st day of March in the year in which they are levied until the same are paid, but as between the grantor and grantee such lien shall not attach until the first Monday in February of the succeeding year."

Statutes of this kind are not uncommon. *Barnum vs. Rallihan,* 112 N. E. 559, 565 (Ind.); *Logan vs. Luukinen,* 231 Pac. 184, 186 (Ore.); *Security System Co. vs. Pierce Co.,* 154 N. E. 190 (Mass.); *Shaffner vs. Lipinsky,* 138 S. E. 418 (N. C.); *McLaren vs. Shebele,* 45 Mo. 130.

So long as they proceed within reasonable limits and general usage, tax regulations are within the discretion of the people of the various states in framing their constitutions and of the legislatures of the states of the Union. *P. S. P. & L. Co. vs. King County,* 264 U. S. 22, 27; 68 L. Ed. 541, 546; *Provident Institution vs. Mayor etc. of Jersey City,* 113 U. S. 506; 28 L. Ed. 1102; *Bells Community R. R. Co. vs. Penn.,* 134 U. S. 232, 237; 33 L. Ed. 892, 895.

The right of removal from a state court to a federal court is purely statutory. It is not granted by the Constitution of the United States. If the joinder of necessary and indispensable parties under the state law prevents removal there is no denial of a federal right. *Phoenix Ins. Co. vs. Pechner,* 95 U. S. 183; 24 L. Ed. 427; *Little York Gold Mining Co. vs. Keyes,* 96 U. S. 199; 24 L Ed. 656; *G. N. Ry. Co. vs. Alexander,* 246 U. S. 276; 62 L. Ed. 713; 23 *R. C. L. Title, Removal of Causes,* p. 610; *Lewiston & N. R. Co. vs. Schmidt,* 177 U. S. 230, 237; 44 L. Ed. 747, 750; *Bellaire vs. B. & O. R. R. Co.,* 146 U. S. 117; 36 L. Ed. 910; *Kohl vs. U. S.,* 91 U. S. 367, 378; 23 L. Ed. 449, 453.

IX. No Federal Question Is Raised by This Appeal.

The questions discussed in the briefs are the service of notice on the appellant by publication, whether all of the Chelan power will be devoted to public use, whether any of this power will be used in the State of Idaho, whether the distribution of the Chelan power by another public service company affects the question of public use, whether the land sought to be condemned was described with reasonable certainty, whether the provision in the decree measuring the elevation of the lake at still water was authorized under the pleadings, errors in instructions given and refused

and whether there was a denial of the right of removal. Under the record in this case none of these issues raise any federal question.

Neither the evidence introduced in the trial court nor the assignments of error on the appeal from the lower court to the Supreme Court of the State of Washington have been certified to this court. Therefore it is impossible to determine whether any federal questions were raised before the Supreme Court of Washington which are not referred to in the opinions of that court. Consequently the only federal questions which this court can consider are those passed upon and discussed in the two opinions of the Supreme Court of Washington rendered in this case. (T. 145, 202.)

The Supreme Court of Washington says in its first opinion on the question of the service of notice by publication:

> "Another assignment of error on behalf of Miss Wick is that due process of law is not afforded non-resident land owners by Section 2, Laws of 1890, p. 295; Rem. Comp. Stat.; Sec. 922 * * *
>
> "In our opinion the statute in question is a valid one, and the notice in this case did provide and give reasonable time and opportunity to be heard."
>
> (T. 145, 148.)

The opinion of the Supreme Court of Washington does not show that any contention was made in that court that the eminent domain statutes of Washington denied appellant due process of law guaranteed to her by the federal constitution. The state court did not hold that the Washington statute with reference to notice in an eminent domain proceeding affords due process of law under the Constitution of the United States, and there is nothing in the record to show that this question was presented to the Supreme Court of Washington. What the Supreme Court of Washington held is that the state statute does not fix the length of time that must elapse between publication and the return day, and that in this instance the 18 days' notice which was given was sufficient to constitute reasonable notice within the due process of law requirement of the state constitution. (Appendix, p 99 and p 100.) In a case of this kind, where the federal constitution is not specifically referred to in the opinion of the court, it will be presumed that the reference is to the state constitution. *Hulbert vs. Chicago,* 202 U. S. 275, 280; 50 L. Ed. 1026, 1028, *Osborne vs. Clarke,* 204 U. S. 565; 51 Law Ed. 619, *Consolidated Turnpike Co. vs. N. & O. V. R. Co.,* 228 U. S. 326; 57 L. Ed. 857.

The decision of the highest court of the state as to the validity of a state statute under the state constitution is conclusive on this court. *P. S. P. & L. Co. vs. King County,* 264 U. S. 22; 68 L. Ed. 541.

Where due process of law, including just compensation for property taken for public purposes, is guaranteed by the state laws and constitution, and the case might well have been litigated wholly upon local law, the asserted right to just compensation for property taken in eminent domain proceedings does not necessarily present a question under the Fourteenth Amendment to the United States Constitution so as to sustain an appeal to the Supreme Court of the United States to review a judgment of the highest court of a state denying such right. *Consolidated Turnpike Co. vs. N. & O. V. R. Co.,* 228 U. S. 326; 57 L. Ed. 857. (For provisions of constitution of the State of Washington in regard to due process of law and taking of property for public use, see Appendix, p. 97.)

The question as to the validity of a state law under the constitution of the United States is not necessarily involved so as to sustain an appeal to the Supreme Court of the United States from a state court merely because the state law logically might have been assailed as invalid under the federal constitution upon grounds more or less similar to those actually taken. *Osborne vs. Clarke,* 204 U. S. 565; 51 L. Ed. 619.

On the question of public use the Supreme Court of Washington says in its first opinion:

> "It is claimed that the use contemplated in this case is not a public one, because the Chelan Electric Company has no transmission line nor any customer except the Washington Water Power Company which owns practically all of the stock of the Chelan Electric Company. That situation was explained in the Getty case. The Washington Water Power Company is a public service corporation of this state and is handling the enterprise in the name of the other corporation which was organized for similar public purposes. So far as this point is concerned, there is no question about the public use to which the property will be put.
>
> "Further, it is said that the use is a private one and that there is no right or power of eminent domain, because the electric energy produced at the Lake Chelan plant will be used in Idaho. The same contention was made in the Getty case, wherein we did not find it necessary to decide whether that, if true, would defeat the right of eminent domain, because of a finding in that case to the effect that such electric energy would not be used in the state of Idaho, and said in that case that the record, as we understood it, did not lead to a different view from that of the trial court. Admitting the record and conclusion in that case, relators now say that the proof is different in the present case, that they have now furnished additional evidence in support of their claim. But so has the condemner introduced evidence additional to that it relied on in the other case, and upon all of it, conflicting as it is, the trial court has again found that none of the energy so produced will flow into Idaho. And again

we must say, as in the Getty case, 'an examination of the record does not lead to a different conclusion.' The question involved is one of fact and in reaching our conclusion, as we examine and study the testimony, we bear in mind, of course, the opinion of the trial judge, who had the advantage of observing the appearance of the witnesses and their manner of testifying. This, according to our general rule."

On the question of the sufficiency of the description, the Supreme Court of Washington says in its first opinion:

"It is assigned that the property in each case is not described with reasonable certainty and that, therefore, the trial court obtained no jurisdiction. The descriptions are long and need not be set out in this opinion. An examination of them, however, satisfies us that they are sufficient to satisfy all question of jurisdiction, as the same affects the rights of resident owners upon whom personal service was had, or the rights of any non-resident owner upon whom service was had by publication of notice. In substance, the descriptions are like the one held to be sufficient in the Getty case."

Nothing whatever is said by the Supreme Court of Washington about the form of the decree and the measurement of the elevation of the lake at still water. Appellant contends that by measuring the lake at still water the rights obtained by respondent exceed those granted by the Federal Power License. But this point was not passed upon by the Supreme Court of Wash-

ington and there is nothing in the record to show that either of these questions was raised in that court. This court has heretofore refused to take jurisdiction of one of the Lake Chelan cases for the purpose of construing the Federal Power License. *Crooker Perry et al vs. Chelan Electric Co.,* 49 Sup. Ct. R. 478; 73 L. Ed. 545.

Appellant's contentions with respect to the instructions given and refused raise no federal questions. The only questions decided by the State Supreme Court were whether the instructions given commented upon the facts or were argumentative. (T. 204.) Obviously, no federal question is involved. Assignments of error which assail the correctness of various rulings of the state court on purely state questions will be disregarded by this court which is bound by the construction of the state law by the state court. *State of Missouri ex rel. Hurwitz vs. North,* 271 U. S. 40; 70 L. Ed. 818.

Appellant not having caused the evidence to be certified to this court, it will be presumed that there was evidence tending to support the findings of the state court. *Hansen vs. Boyd,* 161 U. S. 397; 40 L. Ed. 746; *Clarke vs. Pennsylvania,* 128 U. S. 395; 32 L. Ed. 487; *Capperton vs. Bowyer,* 14 Wall 216; 20 L. Ed. 882.

There is no presumption, in the absence of a reference to the federal questions in the opinion of the state court, that the state court considered such questions, and where there is no proof that it did, this court will decline to review the questions. *Chicago I. & L. R. Co. vs. McGuire,* 196 U. S. 128; 49 L. Ed. 413.

In order that a federal question may be considered by this court on writ of error to a state court, it must appear upon the record that the Supreme Court of the state dealt with the question. *Cox vs. State of Texas,* 202 U. S. 446, 50 L. Ed. 1099; *Bullen vs. Wisconsin,* 240 U. S. 625, 632; 60 L. Ed. 830, 836; *C. B. & Q. R. Co. vs. Railroad Commission,* 237 U. S. 220, 234; 59 L. Ed. 926, 933; *Illinois Central Railroad Co. vs. Mulberry Hill C. Co.,* 238 U. S. 275, 281, 59 L. Ed. 1306, 1309.

The record must affirmatively show that the validity of the state statute under the Constitution of the United States was drawn in question as repugnant to the Constitution, and that the decision of the State Supreme Court sustained its validity, or that a right under the Constitution or laws of the United States was especially set up or claimed, and denied. *L. & N. R. Co. vs. Louisville,* 166 U. S. 709; 41 L. Ed. 1173; *Oxley Stave Co. vs. Butler Co.,* 166 U. S. 648; 41 L. Ed. 1149; *Home for Incurables vs. City of New York,*

187 U. S. 155, 47 L. Ed. 117; *Seaboard Air Line R. Co. vs. Duvall,* 225 U. S. 477, 56 L. Ed. 1171.

An assignment of error raising a federal question must be specific and if the record brought here shows that no such federal question was raised in the State Supreme Court, or that it was raised in very general terms, it will be held that the federal question has been waived. "There is nothing to prevent a party from waiving a federal right of this character if he chooses to do so, either in express terms or as a necessary implication from his manner of proceeding in the cause." *Harding vs. Ill.,* 196 U. S. 78, 49 L. Ed. 394; *Marvin vs. Trout,* 199 U. S. 212, 50 L. Ed. 157; *Clarke vs. McDade,* 165 U. S. 168, 41 L. Ed. 673; *Hamblin vs. Western Land Co.,* 147 U. S. 531, 37 L. Ed. 267; *Hulbert vs. Chicago,* 202 U. S. 275, 50 L. Ed. 1026.

The appellant cannot in this court argue other federal questions, not directly connected with those decided by the State Supreme Court, and not raised in that court. It is not enough that there may be somewhere hidden in the record questions which, if raised, would be of a federal nature. A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. A point that was never raised cannot be said

to have been decided adversely to a party who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment which is silent upon the question is a denial of a claim or right which might have been involved therein, but which, in fact, was never in any way set up or spoken of. *Dewey vs. Des Moines,* 173 U. S. 193, 43 L. Ed. 665; *Hamilton Mfg. Co. vs. Mass.,* 6 Wall. 632, 18 L. Ed. 904; *Mattheson vs. Alabama Bank,* 7 How. 260, 12 L. Ed. 692.

The defeated party cannot raise a federal question for the first time when he takes his writ of error to the Supreme Court of the United States. It is even too late to raise a federal question for the first time in a petition for rehearing after the final judgment of the state court of last resort. *Consolidated Turnpoke Co. vs. N. & O. V. R. Co.,* 228 U. S. 326, 57 L. Ed. 857; *Burt vs. Smith,* 203 U. S. 129, 51 L. Ed. 121; *Harding vs. Illinois,* 196 U. S. 78, 49 L. Ed. 394; *Sayward vs. Denny,* 158 U. S. 180, 183; 39 L. Ed. 941, 942.

The right of removal to the federal court was not denied to appellant. As heretofore pointed out, this case was removed to the federal court and remanded to the state court. (T. 34.). At the trial on the question of damages and upon the conclusion of respondent's evidence appellant presented a second petition

for removal to the federal court. (T. 86, 92.) The first and second petitions for removal are substantially identical. (T. 20, 86.) At the time of the presentation of both petitions for removal, Chelan County, Washington, a municipal corporation, and a citizen of the State of Washington, was and still is a joint defendant in the action with appellant, a citizen and resident of the state of Pennsylvania. Chelan County joined in the motion to remand the case to the state court (Tr. 25, 27), and filed written objections to the second petition for removal. (T. 175, 176.) The trial court found that between the presentation of the first petition and the second petition for removal there had been no change in the status of the parties to the action. (T. 95.)

An order of a Federal District Court remanding a cause to a state court is not subject to review by the Federal Supreme Court, either directly or indirectly, or by writ of error to the Supreme Court of a state. The action of the Federal District Court in remanding a cause is final and conclusive. *Matter of Matthew Addy Steamship Co. vs. Commerce Corporation, supra, Pacific Line S. S. Co. vs. Lewis, supra, Missouri Pacific Ry. Co. vs. Fitzgerald, supra, McLaughlin Bros. vs. Hallowell, supra.*

The denial by the state court of a second petition to remove a cause to a federal court does not deny any federal right within the meaning of the statutes of the United States governing the appellate jurisdiction of the United States Supreme Court where the state court did no more than bow to the decision and order of the federal court in the first removal proceedings, remanding the cause to the state court. *McLaughlin Bros. vs. Hallowell,* 228 U. S. 278; 57 L. Ed. 835.

A state court cannot be held to have decided against a right of removal when it has simply accepted the conclusion of the federal court remanding the cause. *Missouri Pacific Ry. Co. vs. Fitzgerald,* 160 U. S. 556,, 581; 40 L. Ed. 536, 542.

It is respectfully submitted that no substantial federal questions are involved in this case.

To give this court jurisdiction on appeal from a state court, there must be a real and substantial controversy which deserves serious attention. *U. S. Fidelity & Guaranty Co. vs. State of Oklahoma,* 250 U. S. 111, 63 L. Ed. 876; *Boston vs. Jackson,* 260 U. S. 309; 67 L. Ed. 274; *Norton vs. Whiteside,* 239 U. S. 144, 153; 60 L. Ed. 186, 190.

It is the duty of the court to decline jurisdiction whenever it appears that the constitutional question presented is not substantial in character. *Zucht vs. King,* 260 U. S. 174; 67 L. Ed. 194.

Questions of the kind here presented have been held to be too frivolous and unsubstantial in character to warrant this court taking jurisdiction. *House vs. Road Improvement Dist. No. 5, supra, Missouri Pacific R. Co. vs. Clarendon Boat Co.,* 257 U. S. 533; 66 L. Ed. 354; *Deming vs. Carlisle Packing Co.,* 226 U. S. 102; 57 L. Ed. 140.

We respectfully submit that the appeal should be dismissed and the judgment of the Supreme Court of the State of Washington affirmed.

F. G. DORETY,
THOMAS BALMER,
EDWIN C. MATTHIAS,
CHARLES S. ALBERT,
FRANK T. POST,
Attorneys for Respondent.

APPENDIX

CONSTITUTION OF THE STATE OF WASHINGTON

ARTICLE I.

Bill of Rights

Sec. 3. PERSONAL RIGHTS—No person shall be deprived of life, liberty, or property without due process of law.

ARTICLE XXI.

Water and Water Rights

Sec. 1. PUBLIC USE OF WATER—Use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use.

AMENDMENT IX.

Art. I., Sec. 16. EMINENT DOMAIN—Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, . . . irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained

by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public. . . .

REMINGTON'S COMPILED STATUTES OF WASHINGTON, 1922

Sec. 921. EMINENT DOMAIN BY CORPORATIONS: PETITION, REQUISITES OF—Any corporation authorized by law to appropriate land, real estate, premises, or other property for right of way or any other corporate purposes, may present to the Superior Court of the county in which any land, real estate, or premises, or other property sought to be appropriated shall be situated . . . a petition in which the land, real estate, premises or other property sought to be appropriated *shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records,* the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascer-

tain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by such corporation, to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such lands, real estate, premises, or other property . . . (L. '88, p. 58, Sec. 1; L. '90, p. 294; 2 H. C., sec. 648.)

Sec. 922. NOTICE, CONTENTS AND SERVICE.

A notice, stating briefly the objects of the petition, *and containing a description of* the land, real estate, premises or property sought to be appropriated, and stating the time and place when and where the same shall be presented to the court, or the judge thereof, shall be served on each and every person named therein as owner, encumbrancer, tenant, or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering a copy of such notice to each of the persons or parties so named therein, if a resident of the state; or in case of the absence of such person or party from his or her usual place of abode by leaving a copy of such notice at his or her usual place of abode. . . . *In all cases where the owner or person claiming an interest in such real or other property is a non-resident of this*

state, or where the residence of such owner or person is unknown, and an affidavit of the agent or attorney of the corporation shall be filed that such owner or person is a non-resident of this state, or that, after diligent inquiry, his residence is unknown, or cannot be ascertained by such deponent, *service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks; . . . And such publication shall be deemed service upon each of such non-resident person or persons whose residence is unknown.* . . . Due proof of service of such notice, by affidavit of the person serving the same or by the printer's affidavit of publication, shall be filed with the clerk of said Superior Court before or at the time of the presentation of such petition. Want of the service of such notice shall render the subsequent proceedings void as to the person not served; but all persons or parties having been served with notice as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings. (L. '88, p. 28, Sec. 2; L. '90, p. 299, Sec. 2; 2 H C., Sec. 649.)

Sec. 925 COURT TO ADJUDICATE NECESSITY FOR APPROPRIATION; CALLING JURY.

At the time and place appointed for hearing said petition or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises or other property described in said petition, have been duly served with said notice as above prescribed, and shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use, or is for a private use for a private way of necessity, and that the public interest requires the prosecution of such enterprise, or the private use is for a private way of necessity, and that the land, real estate, premises, or other property sought to be appropriated are required and necessary for the purpose of such enterprise, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing the sheriff to summon a jury. (Cf. L. '88, p. 60, Sec. 4; L. '90, p. 297, Sec. 4; 2 H. C., Sec. 651; L. '97, p. 63, Sec. 1.)

Sec. 926. TRIAL—HOW CONDUCTED.

A judge of the Superior Court shall preside at the trial . . . and the jurors at such trial shall make in each case a separate assessment of damages which shall

result to any person, corporation, or company, or to the state, *or to any county,* by reason of the appropriation and use of such land, real estate, premises, or other property by such corporation, as aforesaid, for any and all corporate purposes, and shall ascertain, determine, and award the amount of damages to be paid *to said owner or owners respectively, and to all tenants, encumbrancers and others interested,* for the taking or injuriously affecting the land, real estate, premises, or other property, for the purpose of such enterprise, irrespective of any benefit from any improvement proposed by such corporation. . . . Upon the verdict of the jury, judgment shall be entered for the amount of the damages awarded *to such owner or owners respectively, and to all tenants, encumbrancers, and others interested,* for the taking or injuriously affecting such land, real estate, premises or other property. (L. '90, p. 297, Sec. 5; 2 H. C., Sec. 652.)

Sec. 927. JUDGMENT AND DECREE OF APPROPRIATION.

At the time of rendering judgment for damages, whether upon default or trial if the damages awarded be then paid, or upon their payment, if not paid at the time of rendering such judgment, the court, or judge thereof, shall also enter a judgment or decree of appropriation of the land, real estate, premises, right of

way, or other property sought to be appropriated, thereby vesting the legal title to the same in the corporation seeking to appropriate such land, real estate, premises, right of way, or other property for corporate purposes. Whenever said judgment or decree of appropriation shall affect lands, real estate or other premises, a certified copy of such judgment or decree of appropriation may be filed for record in the office of the auditor of the county where the said land, real estate, or other premises are situated, and shall be recorded by said auditor like a deed of real estate, and with like effect. If the title to said land, real estate, premises, or other property attempted to be acquired is found to be defective from any cause, the corporation may again institute proceedings to acquire the same, as in this chapter provided. (Cf. L. '90, p. 298, Sec. 6; L. '91, p. 84, Sec. 1; 2 H. C., Sec. 653.)

TAX LAWS

Laws Extraordinary Session 1925 (Passed at the Extraordinary Session of the Legislature of the State of Washington, convened November 9, 1925)

CHAPTER 130

RELATING TO ASSESSMENT, LEVY AND COLLECTION OF TAXES

Sec. 138. The acts and parts of acts relating to taxation and the assessment, levy and collection of taxes, enumerated in the following schedule, are hereby repealed.

SCHEDULE

"Chapter CXXIV (124) Laws of 1893, pp. 323-385; . . . Chapter CLXXVI (176) Laws of 1895, p. 508-525; . . . Chapter LXXI (71), Laws of 1897, pp. 136-193; . . . Chapter 59, Laws of 1903, pp. 73-78.

"The following sections of Remington's Compiled Statutes of Washington: 11097 to 11171, both inclusive; 11188 to 11200, both inclusive; 11219 to 11225, both inclusive; 11234 to 11241, both inclusive; 11252 to 11311, both inclusive; and 11315 to 11317, both inclusive."

FEDERAL JUDICIAL CODE

Sec. 29. PROCEDURE FOR REMOVAL.

Whenever any party entitled to remove any suit mentioned in the last preceding section, . . . may desire to remove such suit from a state court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court . . . and shall make and file therewith a bond . . . *Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same.* . . .

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In the Supreme Court
OF THE
United States

No. ~~682~~ 29
October Term, 1929

ALICE BARBEE WICK,
Appellant,

vs.

CHELAN ELECTRIC COMPANY and CHELAN COUNTY, a municipal corporation,
Respondents.

RESPONDENTS' STATEMENT OPPOSING JURISDICTION

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In the Supreme Court
OF THE
United States

No. 652

October Term, 1929

ALICE BARBEE WICK,

Appellant,

vs.

CHELAN ELECTRIC COMPANY and CHELAN COUNTY, a municipal corporation,

Respondents.

RESPONDENTS' STATEMENT OPPOSING JURISDICTION

APPELLANT'S CONTENTIONS

Appellant seeks the review by this court of a judgment of the Supreme Court of the State of Washington affirming a judgment of the Superior Court of Chelan County awarding her $13,500 as damages in an eminent domain proceeding for land overflowed by a water power project of the Chelan Electric Company. Jurisdiction of the court is invoked upon the stated grounds, (1) that the state

statute providing for notice to non-residents by newspaper publication once a week for two successive weeks does not constitute due process of law and that the notice actually given was insufficient; (2) that permitting the Electric Company to condemn lands for the purpose of developing power later to be sold to another public service corporation constituted the taking of property for private use and was not due process of law, and (3) that the state statute providing that taxes shall be a lien upon real estate vested an interest in Chelan County, a citizen of the State of Washington and thereby prevented removal of the cause to the Federal Court in violation of the constitutional provision conferring jurisdiction upon Federal Courts in controversies between citizens of different states. The only reference to other claims of jurisdiction is the following paragraph:

> "The validity of the proceeding was also challenged on the ground that it conflicted with the Fourteenth Amendment to the Federal Constitution because there was no adequate description of property sought to be condemned, that the land appropriated was in excess of the amount authorized by the Federal Power Commission and that the petition did not designate whether an easement or the title to the property was being condemned."

Appellant attempts no discussion of the grounds referred to in this paragraph nor cites authorities to support them.

The opinions of the Supreme Court of Washington affirming the order of public use and necessity and affirming the judgment awarding damages are reported in:

State ex rel Woodruff vs. Superior Court, 145 Wash. 129, 259 Pac. 279 (R. 347, 347½);

Chelan Electric Company vs. Wick, 148 Wash. 179, 269 Pac. 827 (R. 534).

I.

The Contention in Regard to Notice of Hearing Given Appellant is Unsubstantial and Does Not Raise a Federal Question.

The Washington condemnation statute relating to notice provides that in cases of non-residents "service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks . . . . and such publication shall be deemed service upon each of such non-resident person or persons whose residence is unknown." *Remington's Compiled Statutes of Washington,* Sec. 922.

The notice was published three times, once each week, on September 23, September 30 and October 7, 1926. (R. 19, 20.) Eighteen days intervened between the first and last publication. The notice was returnable October 11. (R. 21, 22.) The appellant appeared

in the proceeding three days before this time, or on October 8. (R. 15-17.) Hearing on the petition was actually had February 28, 1927—over four and one-half months afterwards. The appellant, through her counsel, was present at the hearing and contested the granting of the order of public use and necessity. (R. 62.)

The Supreme Court of the State of Washington determined that this statute did not regulate the return day in relation to the date of the publication and simply provided the minimum number of publications that must be made, once a week for two successive weeks; that this was not unreasonably short; and that the notice provided and gave reasonable time and opportunity to be heard. (R. 347½.)

State ex rel Woodruff vs. Superior Court, 145 Wash. 129, 137, 259 Pac. 279, 382.

The meaning attributed by the highest court of the state to the statute of the state must be accepted and such construction followed by the Supreme Court of the United States as though it had been specifically expressed in the statute.

Knights of Pythias vs. Meyer, 265 U. S. 30, 33, 68 L. Ed. 885, 888;

Saltonstall vs. Saltonstall, 276 U. S. 260, 270, 72 L. Ed. 565, 568;

Carroll County vs. U. S., 18 Wall. 71, 82, 21 L. Ed. 771, 775.

"Mixed with the contention is a charge that the notice to non-residents did not comply with the Act of 1893 or the general law of the state, but this is decided against plaintiffs in error by the Supreme Court of the State and we accept its ruling."

Ballard vs. Hunter, 204 U. S. 241, 255, 51 L. Ed. 461, 471.

A contention was made in this court that a statute authorizing seventeen days' notice by publication of an assessment for benefits in the establishment of a road district did not provide due process of law and violated the Fourteenth Amendment. The State Supreme Court held that the statute allowed 28 days' notice after the first publication during which time objection might have been made to the assessment. On the claim of insufficient notice and insufficient description this court said:

"Accepting the statute as construed by the state court, the suggested objections to its validity appear wholly wanting in merit."

House vs. Road Improvement Dist. No. 5, 266 U. S. 175, 177, 69 L. Ed. 229, 230.

This court has held in a case construing a Washington statute, that publication of notice in three successive issues of the official paper was sufficient and that it was impossible to hold that a ten days' notice was so short as to be absolutely void.

> "And especially is this true when the Supreme Court of the state in which the proceedings were had has ruled that it was sufficient. Before proceedings for the collection of taxes sanctioned by the Supreme Court of a state can be stricken down in this court it must clearly appear that some one of the fundamental guarantees of the rights contained in the Federal Constitution has been invaded."
>
> *Bellingham & B. C. R. Co. vs. New Whatcom,* 172 U. S. 314, 320, 43 L. Ed. 460, 462.

A provision of the Bankruptcy Act requiring ten days' notice is not unconstitutional because so unreasonable as to be incompatible with fundamental law.

> *Hanover National Bank vs. Moyses,* 186 U. S. 181, 192, 46 L. Ed. 1113, 1120.

A statutory requirement of 20 days' notice is satisfied by publication beginning 20 days before the time set:

> "When we speak of giving a week's notice or a month's notice we mean a notice that is a week or a month before the event."
>
> *Newman vs. Lynchburg Inv. Corp.,* 236 U. S. 692, 695, 59 L. Ed. 792, 795.

To give this court jurisdiction of a writ of error to a state court there must be a real and substantial controversy which deserves serious attention.

> *U. S. Fidelity & Guaranty Co. vs. Oklahoma,* 250 U. S. 111, 63 L. Ed. 876;
>
> *Boston vs. Jackson,* 260 U. S. 309, 67 L. Ed. 274;
>
> *Norton vs. Whiteside,* 239 U. S. 144, 153, 60 L. Ed. 186, 190.

A federal question may have been so explicitly foreclosed by prior decisions as to afford no basis for a writ of error.

Leonard vs. Vicksburg S. & P. R. Co., 198 U. S. 416, 49 L. Ed. 1108.

Questions similar to the one here presented with reference to the alleged invalidity of the state statute have been held to be too frivolous and unsubstantial in character to warrant this court taking jurisdiction.

House vs. Road Imp. Dist. No. 5, 266 U. S. 175, 177, 69 L. Ed. 229, 230;

Mo. P. R. Co. vs. Clarendon Boat Co., 257 U. S. 533, 66 L. Ed. 354;

Denning vs. Carlisle Packing Co., 226 U. S. 102, 57 L. Ed. 140.

The Supreme Court of Washington did not hold that the Washington statute with reference to notice in an eminent domain proceeding affords due process of law under the constitution of the United States. When the Federal constitution is not specifically referred to in the opinion of the Supreme Court of the state, it is presumed that the reference is to the state constitution.

Hulbert vs. Chicago, 202 U. S. 275, 280, 50 L. Ed. 1026, 1028;

Osborne vs. Clark, 204 U. S. 565, 51 L. Ed. 619;

Consolidated Turnpike Co. vs. N. & O. V. R. Co., 228 U. S. 326, 57 L. Ed. 857.

The decision of the highest court of a state as to the validity of a state statute under the state constitution is conclusive on this court.

Puget Sound Power & Light Co. vs. King County, 264 U. S. 22, 68 L. Ed. 541.

This court has held that 10 days' notice is sufficient to constitute due process of law. The appellant had 18 days' notice. She appeared in the action within 15 days and objected that she had received insufficient notice to make it possible for her to appear. Thereafter she had nearly five months within which to prepare for trial. Only in clear cases will this court set aside an act of legislation as wholly ineffectual on account of the shortness of time. The Washington statute has been in force for 38 years without question. These considerations demonstrate the frivolous and unsubstantial nature of the question raised.

II.

THE DETERMINATION BY THE STATE COURT THAT THE USE MADE BY THE WASHINGTON WATER POWER COMPANY OF THE POWER DEVELOPED BY THE CHELAN ELECTRIC COMPANY WAS A PUBLIC USE IS A CONCLUSION BASED UPON FINDINGS OF FACTS SUPPORTED BY EVIDENCE WHICH HAS NOT BEEN BROUGHT BY APPELLANT TO THIS COURT AND WHICH EVIDENCE IS THEREFORE NOT IN DISPUTE. NO FEDERAL QUESTION IS INVOLVED.

Appellant's intention is succinctly stated by the Supreme Court of the State of Washington:

"It is claimed that the use contemplated in this case is not a public use because the Chelan Electric Company has no transmission line nor any customer except the Washington Water Power Company which owns practically all of the stock of the Chelan Electric Company. That situation is explained in the *Getty* case. The Washington Water Power Company is a public service corporation of this state and is handling the enterprise in the name of the other corporation which was organized for similar public purposes. So far as this point is concerned there is no question about the public use to which the property will be put." (R. 347½.)

State ex rel Woodruff vs. Superior Court, 145 Wash. 129, 259 Pac. 279.

In the *Getty* case, so-called, the Supreme Court summarized the relationship of the Washington Water Power Company to the Chelan Electric Company:

"Relator is a public service corporation which desires to expropriate the right to overflow certain lands of the respondents for the purpose of raising the surface of Lake Chelan, and thereby developing a large amount of electric energy. The primary purpose of the corporation appears to have been to furnish motive power for the operation of the trains of the Great Northern Railway Company, but, owing to the fact that the Railway Company has not yet started the development of its properties for that purpose, it was deemed better to allow the development of the power site to be handled by a company already actively engaged in that business, and which would have immediate demand and sale for the energy thus produced. To this end all of the

stock, save five qualifying shares, were sold to the Washington Water Power Company, which company agreed to develop the project and sell electricity to the railroad, when and as it became needed through the electrification of its railroad lines.

The Washington Water Power Company, which thus became practically the sole owner of the relator company, has been engaged in business in this state for many years supplying electrical energy to a very large extent in eastern Washington, and to a lesser extent in the neighboring state of Idaho. It has five water power sites on the Spokane River in this state and one in Idaho. It supplies electric energy to other public service corporations for the operation of railways and electric lines, furnishes power to municipalities and the inhabitants thereof for lighting streets and homes, as well as supplying power for general uses. Its present capacity of electric energy is insufficient for the demands made upon it, and, in 1925 and 1926, it was obliged to purchase power to avoid a shortage. To overcome the shortage and comply with new contracts, it is seeking to develop the Lake Chelan project. The power produced at this project will be delivered to it, and from it to its customers in the State of Washington."

After referring to one of its previous decisions, the court further said:

"This state has by statute since that time created the Public Service Commission with a duty upon it of regulating the service given and the rates charged by such companies as the relator and has submitted itself to that jurisdiction. The rights of the public to the use and enjoyment of electric power are, therefore, regulated, guaran-

teed and safeguarded by proper legislation, and public necessity requires that in fulfilling the duties it owes to the public generally, it be granted the right of eminent domain."

State ex rel Chelan Electric Co. vs. Superior Court of Chelan County, 142 Wash. 270, 253 Pac. 115.

The facts found are that the Chelan Electric Company is a public service company incorporated to manufacture the water power in question and to furnish power for any purpose to individuals, public or private corporations or municipal bodies. Its own rate schedules and those of the Washington Water Power Company have been filed with the State Department of Public Works of Washington, which h the right to regulate service and rates. The State of Washington and the Federal Power Commission had duly licensed the project subject to regulation by the state and federal bodies. The Washington Water Power Company, a public service corporation, owned all of the Chelan Electric Company stock except five qualifying shares for trustees. It was subject also to regulation by the State Department of Public Works. It had contracted to furnish public service corporations electric energy for railways and municipalities which depended upon it for such power. One contract required it to furnish power to the Great Northern Railway Company. The plants existing in 1925 and

1926 were insufficient to supply the needs of its customers and it became necessary to construct another plant, and for that purpose it bought the capital stock of the Chelan Electric Company and furnished the latter company with the money necessary to develop the Chelan power and deliver electric energy to the Washington Water Power Company. In order to develop the power and meet the requirements of the public and the customers of the Water Power Company it was necessary to construct a dam and overflow the lands of the appellant. It was found as a fact that the entire electric energy sold to the power company is and will be devoted to a public use, that the object for which the appellant's lands were appropriated was a public object and use, and was found as a conclusion of law also that the public interest required the prosecution of the enterprise, that the appellant's lands were necessary for that purpose, and that the use contemplated was a public use. (R. 62-80.)

The evidence upon which the findings of fact are based has not been made a part of the record and consequently the findings are not open to dispute in this court. It will be assumed there was evidence to support the findings.

Hansen vs. Boyd, 161 U. S. 397, 40 L. Ed. 746;
Clarke vs. Penna, 128 U. S. 395, 32 L. Ed. 487;
Capperton vs. Bowyer, 14 Wall. 216, 20 L. Ed. 882.

The rights of the public to the use of the hydro-electric power to be generated by the respondent, are regulated, guaranteed and safeguarded by proper legislation. The fact as found by the trial court is that the power company, for the purpose of supplying power for public use, purchased the stock of an existing company, the electric company, and is doing through the electric company what it must do, and that is, supply such power, regulated and controlled by the Department of Public Works of Washington. New power is delivered to the power company for the public use of its customers. The Federal Power Commission has granted a license to the Chelan Electric Company for fifty years to develop and use power and the State Supervisor of Hydraulics has authorized the appropriation of the water. Recapture of the property may, at the end of this period be had. It is, therefore, necessary that the separate corporate status of the Chelan Electric Company be preserved so that there may be a separate accounting. Excess earnings must be paid to the Government. The cost of this particular project must be allowed in the accounting. The state and federal licenses import the public purpose of the development. The Washington Supreme Court in two cases has approved this method of handling similar projects by separate companies:

"Does the fact that the respondent will sell and deliver a portion of its electrical power to third persons and corporations to be by them used for public and municipal rights and in the operation of railroads and railways, afford a sufficient reason for denying to it the right of eminent domain? We think not. Courts look to the substance rather than to the form, to the end rather than to the means. If in the end the property is to be devoted to a public use, the manner, agency or instrumentality through which that result is accomplished is a matter of no concern."

State ex rel. Dominick vs. King County Superior Court, 52 Wash. 196, 100 Pac. 317;

State ex rel. Trimble vs. Superior Court, 31 Wash. 445, 72 Pac. 89.

No state statutes are set out in the jurisdictional statement as being repugnunt to any specific provision of the Constitution of the United States. It is assumed that an attempt is made to question the validity of the eminent domain provisions of the Washington law. It is claimed that the trial court's finding the use to be a public use was "interpreting this statute of eminent domain as authorizing appellant's land to be taken for such a use."

This interpretation raises no federal question. The meaning given to the state statute is accepted by this court.

Knights of Pythias vs. Meyer, 265 U. S. 30, 33; 68 L. Ed. 885, 888, and cases cited under Point I.

III.

The Interpretation by the State Supreme Court of the Tax Statutes to the Effect That the Taxes Constituted a Lien Upon Real Estate Does Not Raise a Federal Question.

It is appellant's contention that the State Supreme Court interpreted Sections 11234, 11235, 11239, 11240, 11241, 11252, 11267 and 11272 of Remington's Compiled Statutes of Washington to mean that taxes were a lien upon the property of the appellant and that this interpretation prevented removal to the Federal Court.

The condemnation petition alleged that the names of each and every owner, encumbrancer, person or party interested in the property described, insofar as the same could be ascertained from the public records, were the appellant and Chelan County. This was required by the state statute. (R. C. S., Section 92.) The appellant and Chelan County were necessary and indispensable parties.

Removability is determined by the allegations of the condemnation petition and the cause cannot be converted into a removable cause by evidence or lack of it. This can only be accomplished by voluntary amendment or dismissal.

G. N. Ry. Co. vs. Alexander, 246 U. S. 276; 62 L. Ed. 713.

The statutory provisions attacked by the appellant were repealed long prior to the institution of this proceeding and were not before the State Supreme Court for consideration. In 1925 the Washington Legislature enacted a comprehensive tax code (Ch. 130, Laws of Washington, Extraordinary Session 1925), and repealed the previous statutes, including the particular sections referred to by appellant. Section 138 of the Code provides:

> "The acts and parts of acts relating to taxation, assessment, levy and collection of taxes, enumerated in the following schedule are hereby repealed . . . The following sections of Remington's Compiled Statutes of Washington: 11097 to 11171, both inclusive; 11188 to 11200, both inclusive; 11219 to 11225, both inclusive; 11234 to 11241, both inclusive; 11252 to 11311, both inclusive; and 11315 to 11317, both inclusive."

The question raised by appellant as to the effect of these provisions is therefore not before the court.

Section 104 of Chapter 130, Laws of Washington Extraordinary Session 1925, provides:

> "The taxes assessed upon real property shall be a lien thereon from and including the 1st day of March in the year in which they are levied until the same are paid, but as between the grantor and grantee such lien shall not attach until the first Monday in February of the succeeding year."

Interpreting the condemnation and tax statutes of the state, the Supreme Court of Washington has held that the holder of a tax lien is a necessary party defendant in an eminent domain proceeding.

State ex rel. Woodruff vs. Superior Court, 145 Wash. 129, 259 Pac. 379;

Green vs. Tidball, 26 Wash. 338, 67 Pac. 84;
North Coast Ry. vs. Hess, 56 Wash. 335; 105 Pac. 853;

Linne vs. Bredes, 43 Wash. 540, 86 Pac. 858;

DeVoe vs. Rundle, 33 Wash. 604, 74 Pac. 836;

2 Lewis on Eminent Domain (3rd Ed.), Sections 528, 535;

State vs. Easton & Amboy R. R. Co., 36 N. J. Law 181;

Watson vs. N. Y. C. R. Co, 47 N. Y. 157, 162.

The county being an indispensable party under the laws of the State of Washington, the case was not separable as between it and appellant Wick.

C. & O. R. Co. vs. Cockrell, 232 U. S. 146, 58 L. Ed. 544;

McCallister vs. C. & O. Ry., 243 U. S. 302, 310, 61 L. Ed. 735, 740;

Baker vs. Jacksonville Traction Co., 247 Fed. 718;

Maloney vs. Cressler, 210 Fed. 104;

Beckwith vs. C. M. & St. P. Ry. Co., 223 Fed. 858;

Gulf & S. I. R. Co. vs. Gulf Refining Co., 260 Fed. 262;

Roberts vs. Underwood Co., 257 Fed. 583.

The appellant Wick filed a petition and bond for removal in the lower court and secured an order removing the case to the District Court of the United States for the Eastern District of Washington, Northern Division. (R. 23-26.) There was no claim made of fraudulent joinder. The case then came on for hearing before the latter court upon a motion to remand, which was granted. (R. 46-47.)

An order of a Federal District Court remanding a cause to a state court is not subject to review by the Federal Supreme Court, either directly or indirectly, or by writ of error to the Supreme Court of a state. The action of the Federal District Court in remanding a cause is final and conclusive.

Matter of Matthew Addy Steamship Co. vs. Commerce Corporation, 256 U. S. 417, 65 L. Ed. 1027;

Pacific Live Stock Co. vs. Lewis, 241 U. S. 440; 60 L. Ed. 1084;

Missouri Pacific Ry. Co. vs. Fitzgerald, 160 U. S. 556, 581, 40 L. Ed. 536, 542;

McLaughlin Bros. vs. Hallowell, 228 U. S. 278, 286, 57 L. Ed. 835, 839.

The counsel for appellant admitted this in his brief on the appeal to the Supreme Court of the State of Washington from the judgment awarding damages after this case had been remanded by that court to the Superior Court for trial.

> "There is no U. S. statute allowing an appeal or review from the Federal Court's remanding of a cause, where the removal is attempted on the ground of diversity of citizenship,"

citing:

> "*Removal of Causes,* Jas. Hamilton Lewis, Sec. 305;
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> *Yankhaus vs. Feltenstein,* 244 U. S. 127, 61 L. Ed. 1036;
>
> *McLaughlin Bros. vs. Hallowell,* 228 U. S. 278, 286,

and other U. S. Supreme Court cases."

A state court cannot be held to have decided against a right of removal when it has simply accepted the conclusion of the Federal Court remanding the cause.

> *Missouri Pacific Ry. Co. vs. Fitzgerald,* 160 U. S. 556, 581, 40 L. Ed. 536, 542.

A second petition for removal was presented during the course of the trial involving the question of damages. The evidence of this trial has not been made a part of the record. The order of the court denying the petition for removal is, however, contained in the record and clearly and fully states the facts as they came to the knowledge of the trial court. It appears from this order that the case was called for trial June 23, 1927, and appellant announced that she was ready for trial. The trial then proceeded without objection or special appearance on her part. Before the Chelan Electric Company rested, the evidence

showed that Chelan County was a necessary and indispensable party to the proceeding because of its interest in the vacation of an old road and the establishment of a new road over the property described in the condemnation petition. When the Chelan Electric Company rested, the appellant presented the second petition and the bond on removal but served no notice upon either the Chelan Electric Company or Chelan County. Both made objections to the granting of the petition. The case was reopened and evidence was introduced showing payment of the 1926 taxes by appellant on March 12, 1927, and that the assessed valuation of 1926 still stood as the assessed valuation for 1927. The court, after reciting these facts made the following order:

> "Now, therefore, it appearing to the court that this is not a separate controversy; that there has been no false or fraudulent joinder of parties hereto; that said petition, bond and affidavit on removal have been presented to said court without notice to either said petitioner, Chelan Electric Company or said respondent Chelan County, Washington, a municipal corporation; that the said Alice Barbee Wick has had full knowledge and notice of the fact that the said taxes for 1926 have been paid ever since the 12th day of March, 1927; that this cause proceeded to trial without objection on the part of the respondent Wick; that said Chelan County is a necessary and indispensable party to these proceedings, that this cause has heretofore been attempted to be removed by the said Alice Barbee Wick to the said United States District Court in and for the East-

ern District of Washington, Northern Division, and was on the 3d day of November, 1926, duly remanded by said United States Court to this court; that neither at the time of said removal nor at this time was the removal petition noticed, filed or heard within the time limited by law, and that there has been no change in the status of the parties hereto, requiring the granting of the petition for the removal herein.

"IT IS ORDERED, that said petition for removal be and the same is hereby denied. To which respondent Wick excepts, which exception is allowed." (R. 283-286.)

The question of the invalidity of the application of the taxation statute is therefore moot. The record shows that Chelan County was a necessary and indispensable party, not only because of its interest in its lien for taxes but because of its interest in the road to be vacated and the new road to be constructed across this tract.

The delay in presenting the second petition for removal for over two months and a half after payment of the 1926 taxes and proceeding to trial in the state court without objection waived the removal privilege.

Powers vs. C. & O. R. R. Co., 169 U. S. 92, 42 L. Ed. 673;

Golden vs. N. P. Ry Co., 104 Pac. 549, 220 U. S. 625, 55 L. Ed. 614;

N. P. Ry. Co. vs. Austin, 135 U. S. 315, 34 L. Ed. 218.

The provision requiring written notice of the presentation of the petition is mandatory and failure to give it prevents removal, or, after removal, requires the cause to be remanded. The state court had jurisdiction to pass upon the sufficiency of the removal papers and to deny the petition.

Western Union Telegraph Co. vs. Oakley, 227 S. W. (Texas) 211;

Graves vs. Colquitt Co., 129 S. E. (Ga.) 166;

Warner vs. Bissinger, 210 Fed. 96;

Arthur vs. Maryland Cas. Co., 216 Fed. 386;

Loland vs. N. W. Stevedoring Co., 209 Fed. 626;

Goins vs. S. P. Ry. Co., 198 Fed. 432;

In re Vadner, 259 Fed. 614;

U. S. vs. Sessions, 205 Fed. 502.

The controversy between Chelan County and the Chelan Electric Company is not separable from the controversy between the Chelan Electric Company and the appellant Wick. The county owned an easement in the land involved, and the appellant the fee. The parties were properly joined as defendants. The petitioner, the Chelan Electric Company, was a citizen and resident of the State of Washington and one of the respondents in the condemnation proceeding, Chelan County, was a citizen and resident of the same state. The subject matter of the controversy was whether the whole piece of land should be condemned.

"That controversy is not the less a single and entire one because the two defendants owned distinct interests in the lands and might be entitled to separate awards of damages."

Kohl vs. U. S., 91 U. S. 367, 377, 378, 23 L. Ed. 449, 553;

Bellaire vs. B. & O. R. R. Co., 146 U. S. 117, 36 L. Ed. 910.

The authorities cited under the first point in this brief are conclusive on the point that the interpretation given the state tax statute by the State Supreme Court did not raise a federal question. Moreover, removability did not depend upon this interpretation. It was prevented by the allegations of the condemnation petition, from which it appeared that the petitioner and one of the respondents were citizens of the same state. Furthermore, jurisdiction did not rest upon the taxing statute alone. The interest of the county in the roads made it a necessary and indispensable party.

IV.

The Flowage of Lands as Regulated by the Federal Power License Does Not Differ Materially From the Right Granted by the Decree.

One of the points designated by the appellant's counsel, but which has not been discussed by them, is the claim that the extent of the land appropriated

was in excess of that authorized by the Federal Power License. Assignment of error No. XIII is based on alleged error in making provision in the order of public use and necessity for the raising of the waters to the elevation of 1100 feet still water measurment above mean sea level, instead of to 1100 feet above sea level. The question is not properly before this court. It was not mentioned by the Supreme Court of the State of Washington in its decision. But if it were, it is too frivolous and unsubstantial to support as assignment of error here. The Federal Power License provided that:

> "The licensee shall at no time cause or permit the elevation of the surface of Chelan Lake to be raised above 1100 . . . Said elevations are in feet above mean sea level." (R. 421-440.)

The order of public use and necessity provided that the property to be taken was "the right in perpetuity to inundate and overflow to the maximum elevation of 1100 feet still water measurement above mean sea level" the land described. (R. 62-80.) The words, "still water measurement," define that which is a well known basis for measuring water and added nothing to the extent of the area to be overflowed. Article VIII of the Federal Power License provided:

> "For the purpose of determining . . . the amount of water held in and drawn from storage the licensee shall install and thereafter maintain

a standard gauge or gauges as may be necessary to determine the variation of the level of Chelan Lake and the rates and volume of discharge of water therefrom." (R. 421-440.)

The established method by which such gauge readings are made is from still water measurement, and must necessarily be so, or else there would be no standard to measure by. Manifestly there was no error in thus defining the limitation of the flowage rights. Even if the question were properly before the court it is unsubstantial.

V.

The Alleged Lack of Sufficiency in Description of the Lands Sought to Be Taken Does Not Raise a Federal Question.

The last contention made by the counsel for appellant in her brief is that the description of the land to be taken was inadequate and the petition did not disclose whether corporeal property or an easement was to be acquired. With reference to this the court below said:

"It is assigned that the property in each case is not described with reasonable certainty and that therefore the trial court obtained no jurisdiction. The descriptions are long and need not be set out in this opinion. An examination of them, however, satisfies us that they are sufficient to satisfy all question of jurisdiction as the same

affects the rights of resident owners upon whom personal service was had or the rights of any non-resident owner upon whom service was had by publication of notice. In substance the descriptions are like the one held to be sufficient in the *Getty* case. In this connection it is further claimed that the court erred in denying motions to make the petitions more definite and certain. It appears, however, that with such motions the relators filed motions for bills of particulars for the same purpose and that the order denying the first motions granted the second ones which have been complied with by the petitioner by the giving of minute detailed descriptions by metes and bounds in each and all of the cases of the lands to be flooded." (R. 347½.)

State ex rel. Woodruff vs. Superior Court, 145 Wash. 129, 259 Pac. 379.

What is involved is whether these descriptions complied with the Washington statutory and constitutional provisions. No federal question arises. The notice to the plaintiff in error specified that it was necessary to appropriate and acquire the perpetual right to impound the waters of Lake Chelan and the Chelan River and to raise the same to a maximum elevation of 1100 feet above mean sea level and to inundate and overflow to the maximum elevation of 1100 feet above mean sea level certain real estate, descriptions of which included government subdivisions and shorelands with a statement that the object of the proceeding was to determine the compensation in money to be paid for the taking or injuriously

affecting the lands, real estate and premises described and for a release from liability for all damages in any manner arising from the impounding and storing of the waters of Lake Cheland and the Chelan River. (R. 1-3.) The condemnor was required to include in that compensation all damages by wave wash, erosion, seepage, inundation or similar causes as the result of so holding the waters. (R. 62-80.) Upon a motion to make the descriptions more definite and certain, coupled with a motion to vacate and set aside service of notice, the Superior Court of Chelan County denied the latter motion, but expressly reserved to the plaintiff in error the right to re-present the motion prior to the hearing of the action as to the damage involved. (R. 56.)

Two months before the trial a description by metes, bounds, courses, angles, degrees and acreage was furnished appellants in a five-page typewritten bill of particulars. (R. 251-255.) The objection to the insufficiency of the description is wholly without merit. These descriptions were sufficient. No federal question is involved.

House vs. Road Imp. Dist. No. 5, 266 U. S. 175, 177, 69 L. Ed. 229, 330;

State ex rel. Chelan Electric Co. vs. Superior Court, 142 Wash. 270, 253 Pac. 115;

State ex rel. Woodruff vs. Superior Court, 145 Wash. 129, 259 Pac. 115.

We respectfully submit that the appellant's jurisdictional statement sets forth no substantial federal question for decision by this court.

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SUPREME COURT OF THE UNITED STATES.

No. 29—October Term, 1929.

Alice Barbee Wick, Appellant, vs. Chelan Electric Company. } On appeal from the Supreme Court of the State of Washington.

[November 25, 1929.]

Mr. Justice Butler delivered the opinion of the Court.

Appellee, a public utility corporation organized under the laws of Washington, was empowered to acquire by eminent domain the right to use the water of Lake Chelan for the generation of electricity for public use, and to that end was authorized to impound and raise the water to 1100 feet above mean sea level. Appellant, a resident and citizen of Pennsylvania, owns shore land a part of which is overflowed by the water so raised. Appellee instituted condemnation proceedings in the Superior Court of Chelan County. The petition showed that the purpose was to acquire the right so to raise the water and inundate appellant's land. Notice was published as required. And later appellee filed a bill of particulars describing by metes and bounds the land to be condemned. The court found the taking to be in the public interest, fixed compensation for appellant and by its decree appropriated to the use of appellee the right in perpetuity to overflow such land. The judgment was affirmed in the highest court of the State. 145 Wash. 129. 148 Wash. 479. Appellant seeks review under § 237(a) of the Judicial Code. U. S. C., Tit. 28, § 344(a).

Under the laws of Washington (Remington's Compiled Statutes, 1922, §§ 921 *et seq.*) condemnation proceedings are instituted by the presentation of a petition to the superior court of the county in which is located the property proposed to be taken. Notice is required to be given to those interested as owners or otherwise. § 922. The substance of the provision here attacked follows. "In all cases where the owner . . . is a nonresident of this state . . . service [of the notice] may be made by publication thereof in any newspaper published in the county where such lands are

situated, once a week for two successive weeks . . . And such publication shall be deemed service upon each such nonresident . . ." September 22, 1926, appellee filed a notice that its petition for condemnation would be presented to the court October 11. A notice to that effect was published in a newspaper of the county on September 23, September 30 and October 7. Appellant appeared specially, objected to the jurisdiction of the court, moved to quash the service and challenged the validity of the statute on the ground of its being repugnant to the due process clause of the Fourteenth Amendment.

She says that the service was not complete until two weeks after the first publication and, relying on *Roller* v. *Holly*, 176 U. S. 398, insists that the time allowed is not sufficient. But the supreme court distinguished the Texas statute considered in that case from that of Washington now before us, construed the latter not to require publication for successive weeks and not to prescribe the period of time required to elapse between the giving of the notice and the return day, held that the first publication constituted service and that the intervening eighteen days was sufficient. That court's construction of the state statute is authoritative. No discussion is required to show that the time so allowed is reasonable. There is no ground on which it may be contended that the statute as construed is repugnant to the due process clause. *Huling* v. *Kaw Valley Railway*, 130 U. S. 559, 563. *Bellingham Bay, &c. Co.* v. *New Whatcom*, 172 U. S. 314, 319. *Ballard* v. *Hunter*, 204 U. S. 241, 254, 262. *Goodrich* v. *Ferris*, 214 U. S. 71, dismissing an appeal from the Circuit Court of Appeals (145 Fed. 844) for lack of jurisdiction.

And appellant asserts that as construed in this case the provision of § 922 requiring that the petition shall contain a description of the property proposed to be taken is also repugnant to the due process clause. But mere inspection of the petition shows that the point is utterly devoid of merit.

No attempt was made below to draw in question the validity of any other provision of the state statutes. And, as appellant's contentions above referred to are unsubstantial, this court is without jurisdiction. *Goodrich* v. *Ferris, supra*, 79. *Trenton* v. *New Jersey*, 262 U. S. 182, 192. *Newark* v. *New Jersey*, 262 U. S. 192, 196. *Campbell* v. *Olney*, 262 U. S. 352, 354.

Appeal dismissed.